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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

Gillies

TABLES OF THE CASES AND PRINCIPAL MATTERS.

WITH ADDITIONAL CASES DECIDED DURING THE SAME PERIOD, SELECTED FROM THE CONTEMPORANEOUS REPORTS AND FROM THE DECISIONS IN THE HOUSE OF LORDS, WITH REFERENCES TO DECISIONS IN THE AMERICAN COURTS.

VOL. CV.

CONTAINING

THE CASES DETERMINED IN THE COURT OF QUEEN'S BENCH, AND IN THE EXCHEQUER CHAMBER, IN TRINITY TERM AND VACATION, MICHAELMAS TERM AND VACATION, HILARY TERM AND VACATION, EASTER TERM AND VACATION, AND TRINITY TERM, 1859, 1860. XXII. AND XXIII. VICTORIA.

SAMUEL DICKSON, Esq.,
EDITOR.

OLD BRAD

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1871.

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R E P O R T S
OF
C A S E S
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AND THE
COURT OF EXCHEQUER CHAMBER
ON ERROR FROM THE COURT OF QUEEN'S BENCH.

**WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED, AND
THE PRINCIPAL MATTERS.**

BY
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,
AND
FRANCIS ELLIS, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

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CASES.

ARGUED AND DETERMINED

IN
THE QUEEN'S BENCH,

IN
Trinity Term,

IN THE
TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA. 1859.

Gilliespie

The Judges who usually sat in banc in this Term, were,—

LORD CAMPBELL, C. J.,
WIGHTMAN, J.,

ERLE, J.,
CROMPTON, J.

CUNARD and Others v. HYDE. May 27.

By the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, ss. 170, 171, 172, it is enacted that, before any clearing officer permits a ship wholly or partly laden with timber to clear out from any British port in North America or Honduras, for any port in the United Kingdom, after 1st September or before 1st May in any year, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); and if the master sail without the certificate, or load in the mode forbidden, he shall forfeit 100*l*.

After 1st September, 1856, orders were given for an insurance on cargo and freight by a ship from M., a British port in North America, to a port in the United Kingdom: and the insurance was effected thereupon. Both when the orders were given and when the insurance was effected, it was known to the persons interested in the cargo and freight, and who gave the orders, that much of the cargo was loaded on deck; they intended the ship to sail, so laden, from M. for the United Kingdom, before 1st May, 1857; and they ordered the insurance to be effected with express purpose to cover the whole cargo and freight, including the portion of cargo above deck. On 10th September, 1856, the ship sailed, on the voyage insured, deck laden, and without a certificate to the master from the clearing officer; and the cargo was totally lost.

Held, that the whole voyage was illegal; that the illegality vitiated the insurance with respect to the whole cargo, not merely as to so much of it as was loaded on deck; and that the assured, who were privy to the illegality, could recover nothing from the underwriters.

DECLARATION on a policy of insurance from Miramichi to a port of discharge in the United *Kingdom, calling at Cork for orders: not to discharge on the East Coast; upon any kind of goods and mer- [*2
chandises on the ship called the D. B., beginning the adventure upon the goods and merchandises from the loading thereof aboard the said

ship, as above, until the said goods and merchandises should be safely discharged and landed. Valued at, on freight and cargo, including deck load, 820*l.*: against perils of the seas, &c. Averment, that defendant, for certain premium subscribed the policy, and became an insurer, for 150*l.* That goods were afterwards shipped on board the said ship at Miramichi, to be carried as cargo on the voyage in the policy described, for certain freight: and afterwards the ship, with such cargo on board, sailed on that voyage, and the policy then attached; and that on the voyage, and during the risk, a total loss of the cargo and freight happened by perils of the seas insured against. Averment of interest in the plaintiffs and Alexander Fraser, in the freight and cargo insured, to a greater amount than the moneys insured; and that the insurance was made for the use and benefit, and on account of, the person or persons so interested. That all conditions necessary to entitle plaintiffs to payment had been performed.

Breach, that defendant had not paid his subscription.

Fifth plea. That the policy was made, and the goods were shipped on board the ship, after the passing and coming into operation of stat. 16 & 17 Vict. c. 107. That the goods consisted of timber and wood goods, and that Miramichi is a British port in North America, and that the ship, with the goods, cleared out and sailed from Miramichi after 1st September, 1856: and before 1st May, 1857, to wit, on 10th September, 1856: and that, before *3] and at the time of the ship so sailing, the whole *of the cargo was not below deck; but a considerable part of it was loaded and remained, and was above and upon deck, at the time of the ship sailing, and so continued till the time of the loss; that, at the time of the ship sailing, the master of the ship had not obtained from the clearing officer any certificate that the whole of the cargo was below deck, contrary to the said statute; and that the ship was, at the time of sailing, improperly and unsafely laden for sailing at that time of the year. That the person or persons interested in the cargo and freight had notice of the premises before and at the time of loading of the cargo and of the sailing of the ship, and before and at the time of effecting the policy, and that such person or persons then was or were the owner or owners of the ship, and personally interested in and took part in the ship clearing out and sailing, and proceeding to sea in such condition as aforesaid; and that the ship did so with their knowledge and by their direction and procurement.(a)

Second replication to fifth plea. That the ship was loaded and cleared out, and was ready for sea on, and not after, 1st September, and the sailing of the ship was delayed to wait the arrival of some letters which had accidentally been delayed, and which did not arrive till after 1st September, and the delay was accidental and not part of *4] the scheme for the voyage and adventure, and it *was not an intended part of the scheme and adventure that the ship should be loaded and sail with a deck load after 1st September. And, the said

(a) The plea, as originally framed, did not allege that the insured were, at the time of effecting the insurance, privy to the act of the master of the ship in loading and sailing in contravention of the statute; and was demurred to on the ground that, unless there was, at that time, such privity between the assured and the master, the insurance was not vitiated. The Court (Lord Campbell, C. J., Coleridge, Erle and Crompton, Js.) gave judgment for the plaintiffs against the plea. See *Cunard v. Hyde*, E. B. & E. 670 (E. C. L. R. vol. 96).

papers having arrived, the ship being already loaded, and having cleared out on, and not after, 1st September, did sail after 1st September; of all which premises defendant, before and at the time of his underwriting the policy, had notice and knowledge.

Rejoinder to this replication. That the orders given by the person or persons interested in the cargo and freight, to insure the same, were so given after 1st September, 1856, and that the insurance was, in pursuance of such instructions, effected after 1st September, 1856, and not otherwise; and that, at the time of giving the said orders and of effecting the said insurance, it was known to the party or parties so interested and so giving such orders that a considerable part of the said cargo was then loaded above and upon the deck of the ship, and that at the several times aforesaid it was intended by the said person or persons so interested as aforesaid, that the ship should sail on the voyage in the fifth plea mentioned after 1st September, 1856, and before 1st May, 1857, with the said part of the said cargo, loaded above and upon the deck, remaining so loaded as in the fifth plea mentioned, and that the said person or persons, so interested as aforesaid, ordered the insurance to be effected for the express purpose of covering the said cargo and the freight thereof, including the said portion so loaded above and upon the deck as aforesaid.

Demurrer. Joinder in demurrer.

Blackburn, in support of the demurrer.—The replication is good and the rejoinder is bad. The question depends *upon the construction to be put on The Customs Consolidation Act, 1853, 16 [*5 & 17 Vict. c. 107, ss. 170, 171 and 172, which are as follows. Sect. 170. "Before any clearing officer permits any ship, wholly or in part laden with timber or wood goods, to clear out from any British port in North America, or in the settlement of Honduras for any port in the United Kingdom, at any time after the first day of September or before the first day of May in any year, he shall ascertain that the whole of the cargo of such ship is below deck, and shall give the master of such ship a certificate to that effect; and no master of any ship so laden shall sail from any of the ports aforesaid for any port of the United Kingdom, at any such time as aforesaid, until he has obtained such certificate from the clearing officer." Sect. 171. "No master of any ship in respect of which such certificate as aforesaid has been obtained, shall place, or permit or cause to be placed or remain, upon or above the deck of such ship, any part of the cargo thereof, until such ship has arrived at the port of her destination: provided always, that if the master of any such ship consider that it is necessary, in consequence of the springing a leak or of other damage received or apprehended during the voyage, to remove any portion of the cargo upon deck, he may remove or cause to be removed upon the deck of such ship so much of the cargo, and may permit the same to remain there for such time, as he considers expedient; provided also, that the store spars or other articles necessary for the ship's use shall not be taken to be the cargo for the purposes of this Act." Sect. 172. "If any master of any ship for which such certificate as aforesaid is required, sails or attempts to sail without

*6] having obtained such certificate, or places *or permits, or causes to be placed or to remain or be, upon or above the deck of such ship, any part of the cargo thereof, except in the cases in which the same is not hereby forbidden, he shall for every offence forfeit and pay any sum not exceeding 100*l*." If these enactments render the whole voyage and adventure illegal, where the ship sails laden as described, and without the clearing officer's certificate, then undoubtedly, the rejoinder is a good answer to the action. But it is more reasonable to construe the statute as creating a sort of illegality collateral to the voyage, and one for which a penalty is imposed on the master alone; the voyage remaining legal, although the master should incur the penalty. If so, the replication, which states that the contravention of the statute was no part of the scheme for the voyage, is a good answer to the fifth plea; showing, as it does, that the ship cleared out at a time when the statute did not apply, and that the subsequent delay in sailing was accidental; and the rejoinder in no way contradicts the replication. In Phillips's Treatise on the Law of Insurance, ch. iii. s. ii. § 221 (vol. I. p. 136, 3d ed., Boston), the general principle is well laid down, that "A contravention of law, though it have relation to the subject or the risk, still will not affect the insurance if it be remote and distinct from the contract, or only collateral or concomitant with it, or incidental, or merely precedent or subsequent, and not constituting a part of it or embracing and imbuing its stipulations." The sailing without the certificate, in the present case, was a contravention of law collateral to the insurance. The object of the Legislature was to prevent, as far as possible, ships sailing with deck

*7] loads from the specified ports at a time of year *when it would be dangerous for them to do so; and that object was sought to be effected by the imposition of a penalty on the master, he being the person upon whom the responsibility of commencing such a voyage would, in general, wholly rest. Had it been intended to enact that such a voyage should be illegal, the statute would have contained express words to that effect. The case resembles *Planché v. Fletcher*, 1 Dougl. 251, which decided that there was nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place at which the policy gave liberty to call, but to which there was no intention of going; although, by stat. 13 & 14 Car. 2, c. 11, s. 3, a penalty of 100*l*. was imposed for taking out a false clearance: there being nothing in that statute to make the voyage illegal. That statute, it is true, is not referred to in the report of the case, but, as was said by Lord Ellenborough, C. J., in *Atkinson v. Abbott*, 11 East 135, 141, "the provision of it was probably in the contemplation of the Court." [Lord CAMPBELL, C. J.—It appears from the rejoinder that, at the time of effecting the insurance, it was known to the persons interested in the cargo, that the ship was deck laden, and that they then intended that she should sail in that condition within the prohibited period of the year. That is, they then intended her to do that which the Legislature has declared shall not be done. Does not that avoid the policy on the ground of illegality?] It has no further effect than to render the master amenable to the penalty, upon the intention being carried out

The penalty is in terms restricted to him, *and cannot affect the insurance, the contract of the assured, which contains no agreement, express or implied, that the law should be thus violated by the master; *Wetherell v. Jones*, 3 B. & Ad. 221 (E. C. L. R. vol. 23). [Lord CAMPBELL, C. J.—The absolute prohibition, in the statute, upon the ship sailing, makes the voyage illegal, irrespective of any penalty.] At all events, if the voyage was illegal, the policy is thereby avoided with reference to the deck cargo only, the carrying which is, alone, prohibited by the statute. [Lord CAMPBELL, C. J.—We cannot separate the cargo. The statute says that the ship shall not sail at all, if there be any cargo on deck. The assured was party to the ship's sailing with a deck cargo, and so party to an illegal act.]

Wilde, contra, was not called upon.

PER CURIAM.(a) Our judgment must clearly be for the defendant.
Judgment for the defendant.

(a) Lord Campbell, C. J., Wightman, Erle and Crompton, Js.

*VINER, Appellant, v. The Churchwardens and Overseers of the Parish of TONBRIDGE, Respondents. June 4. [*9]

By stat. 18 & 19 Vict. c. 128, s. 12, it is enacted that "the vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a Burial Board." And, by sect. 13, the Burial Board of "any district (whether a parish or township or other subdivision) not separately maintaining its own poor, but forming part of a parish maintaining its own poor," "by means of a common rate," may require the overseers of the parish to defray the expenses of the board; and the necessary sums may be levied "by an addition to the" "common rate, so far as the same affects the district in respect of which such payments are required, or by separate rates to be made from time to time on such district." Prior to this statute, the parish of T. included T. W., an ecclesiastical district formed under stat. 58 G. 3, c. 45, and S., a hamlet containing a church, to which a district had been assigned under stat. 1 & 2 W. 4, c. 38. Neither T. W. nor S. separately maintained their own poor (there being a common poor rate for the entire parish of T.), but each had its separate burial ground.

A vestry meeting "of the inhabitants of the parish of T." was called, by notice affixed to the doors of all the churches in the parish, including that at S., but excluding those in T. W., to consider whether a burial ground should be provided for such part of the parish of T. as was not included in T. W., and, if so, to appoint a Burial Board for such part of the parish.

A Burial Board for T., excluding T. W., was appointed at this meeting. Held, that the Board was well appointed; that a poor rate made on that part of T. for which such Board was appointed, for defraying the expenses of the Board, was good; and that occupiers of property in S. were properly assessed to the rate; for that though T. W. was entitled to a separate Burial Board, S. was not.

CASE stated, under stat. 20 & 21 Vict. c. 43, on appeal from a decision of justices of the county of Kent.

On 18th September, 1858, a summons was issued and served upon Charles Viner, the appellant, an occupier of a house and buildings rateable to the relief of the poor of the parish of Tonbridge (being situate in the hamlet of Southborough, within the said parish), on a complaint by the respondents for nonpayment by the appellant of a poor-rate made on 2d February, 1858, to which he was assessed. At the hearing, on 22d September, 1858, it appeared that the rate in question was in the following form:

*10] *"An assessment for the relief of the poor of the parish of Tonbridge (excepting such part thereof as lies within the Tonbridge Wells Ecclesiastical District), and for other purposes chargeable thereon according to law, made," &c.

The rate was duly made and allowed by two justices, and notice of it, signed by all the churchwardens and overseers of the parish of Tonbridge, was posted on the door of every church and chapel in the parish, except in that part of the parish comprised in the Tonbridge Wells Ecclesiastical District, on the first Sunday after the allowance of the rate. The parish of Tonbridge, which is a very large parish, maintaining its own poor, includes within its area the town of Tonbridge Wells and the hamlet of Southborough. The former is about five and the latter three miles from the town of Tonbridge. The town of Tonbridge Wells has an Ecclesiastical District, formed under stat. 58 G. 3, c. 45. It has its own church-rate, and has not, since 1849, or thereabouts, contributed, and did not, when the Tonbridge Burial Board was constituted, contribute to the general church rate of the parish (but it did so contribute for the period of twenty years), and has also its own separate churchwardens; the churchwardens appointed for the mother church at Tonbridge town having no jurisdiction or any concern within the Tonbridge Wells Ecclesiastical District as regards church or ecclesiastical matters. A vestry is held at Tonbridge Wells for the appointment of churchwardens, making a church rate, passing accounts, &c. The hamlet of Southborough has a church which was built about twenty-eight years ago; and, on 19th October, 1831, a District was assigned to it, under stat. 1 & 2 W. 4, c. 38; but no separate church rate is levied upon that District, *11] which still contributes to the *general church rate of the parish. (Office copies of the assignment of such District, and a description and plan of the boundary thereof, were annexed to the case.) Meetings are held in the vestry of this church for the purpose of appointing churchwardens, in pursuance of stat. 1 & 2 W. 4, c. 38, and for other purposes connected with the receipt of the pew rents, and the management and repairs of the church. The regular vestries for the whole parish are held at the mother church, in Tonbridge town, at which a church-rate is made for the whole parish, except the Tonbridge Wells Ecclesiastical District. Tonbridge Wells and Southborough have each their separate burial grounds, the one at Tonbridge Wells being detached from the churches (that formerly attached to the District church having become full), and specially provided by a private company for the purpose. The burial ground at Southborough is the church yard attached to the church, which has been consecrated by the Bishop of the diocese, and burials are performed there under the order and direction of the Bishop contained in the assignment of a District to the said church of Southborough. Neither Tonbridge Wells nor Southborough appoint separate overseers from the rest of the parish, nor maintain separately their own poor, there being one common poor-rate for the entire parish. The Ecclesiastical District of Tonbridge Wells forms a considerable part of the parish of Tonbridge, and contains a considerable portion of the property rateable to the relief of the poor in the said parish. On 8th November, 1855, a meeting of the inhabitants of the parish

of Tonbridge was held in the vestry-room of the mother church at Tonbridge town, in pursuance of the following notice, copies of which had been affixed to the doors of all the churches in the parish, *including that of Southborough, but excepting those within [*12 the Ecclesiastical District of Tonbridge Wells :

“The inhabitants of the parish of Tonbridge are requested to meet in the vestry-room of the parish church of Tonbridge on Thursday, the 8th day of November next, at 11 o'clock in the forenoon, for the purpose of considering and determining whether a burial ground shall be provided under stat. 15 & 16 Vict. c. 85, and subsequent Acts relating thereto, for such part of the parish of Tonbridge as is not included in the Tonbridge Wells Ecclesiastical District. And, in case it should be resolved that a burial ground shall be so provided, then also for the purpose of appointing a Burial Board for such part of the parish as aforesaid.

“Dated this 20th day of October, 1855.

“THOS. DOVE, }
“WM. CUSHION, } Churchwardens.”

At this meeting it was agreed that a Burial Board should be formed for the District described in the notice. No vestry (or meeting in the nature of a vestry) was held at Southborough Church, between 20th October and 8th November, 1855, nor were the inhabitants of Southborough consulted as to the formation of the said Burial Board, further than that they were, as inhabitants of the parish of Tonbridge, requested by the said notice to attend the vestry meeting. The Burial Board purporting to be constituted by the inhabitants of Tonbridge, in accordance with the resolutions of the said meeting, erected and made a cemetery at that end of Tonbridge town which is furthest from Southborough, from the church of which the said ground is distant nearly four miles, and from Tonbridge Wells about six miles. The rate in question was made by the said Burial Board, so constituted as aforesaid, and was made entirely for the purpose [*13 of defraying the expenses incurred by the said Burial Board.

The appellant contended that the rate, not being made by a legally constituted Burial Board, or for a legally constituted Burial District, or for purposes for which the appellant was liable to be rated, or in the manner required by stat. 18 & 19 Vict. c. 128, ss. 11 and 13, was altogether void, and could not be legally enforced by the justices. It was contended, on behalf of the alleged Burial Board, that, the rate appearing on the face of it to be regular, and the property of the defendant *primâ facie* liable to be rated, the duty of the justices to order it to be enforced was merely ministerial, and that they had no power to inquire into and decide the question as to the legality of the constitution of the Burial Board or the validity of the rate.

The justices ordered a distress-warrant to issue for the rate, the ground of their decision being that they were of opinion that, the rate appearing on the face of it to be a poor-rate duly allowed, their duty was merely ministerial, and that they ought not to inquire into the actual object of the rate, or the constitution of the alleged Burial Board, or into the liability of the premises, described in the rate, to be thereby rated.

Lush, for the respondents.—The question is whether a Burial Board

was properly constituted for the parish of Tonbridge minus the Tonbridge Wells Ecclesiastical District; and, if so, whether the powers of that Board extend to Southborough as part of the parish minus such district, or Southborough is entitled to have a separate Burial Board of its own. First, the Board was properly constituted. Stat. 18 & *14] 19 Vict. c. 128, (a) s. 12 enacts that **"The vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a Burial Board," "and may exercise the same powers of authorization, approval, and sanction in relation to such Burial Board, and such other powers as under" the Burial Acts "and this Act are vested in the vestry of a parish separately maintaining its own poor; and the Burial Board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish, township, or other district had been a parish separately maintaining its own poor."* And sect. 13 empowers the Burial Board of "any district (whether a parish or township or other subdivision) not separately maintaining its own poor, but forming part of a parish maintaining its own poor" "by means of a common-rate," to require the overseers of the parish to defray the expenses of the Board; and provides that the necessary sums may be levied "by an addition to the" "common-rate, so far as the same affects the district in respect to which such payments are required, or by separate rates to be made from time to time on such district." The Tonbridge Wells Ecclesiastical District is a district which may appoint a Burial Board for itself under section 12 of the Act; because, as an ecclesiastical district, it has a vestry of its own, distinct from that of the entire parish of Tonbridge, so far as all church matters are concerned. And, if that district may appoint a separate Burial Board for itself, there must, by implication, be power for the rest of the parish minus the district to appoint a Burial Board for itself. Then, stat. 15 & 16 Vict. c. 85, (b) ss. 10, *15] *11, show that the vestry of the parish was the proper body to appoint this Board. Secondly, Southborough, for the purposes of the Burial Acts, forms part of the parish of Tonbridge minus the Tonbridge Wells district, and is not entitled to a separate Burial Board. Southborough, unlike Tonbridge Wells, has, "no vestry or meeting in the nature of a vestry" separate from the vestry of the entire parish. The meetings held in the vestry of Southborough Church are not vestry-meetings in the proper sense of the term, but merely meetings of the incumbent and pew-renters of the church, held, in pursuance of stat. 1 & 2 W. 4, c. 38, s. 16, for the appointment of churchwardens to manage the church and collect the pew rents. The church of Southborough is merely a chapel of ease, and the district assigned to it under stat. 1 & 2 W. 4, c. 38 is, by sect. 10 of that Act, a district "so far only as regards the visitation of the sick and other pastoral duties, and" is not to "be deemed a district for any other purpose whatsoever." A separate endowment and an order made by the Bishop thereupon are necessary, under sect. 23 of the same statute, before Southborough can become a district separate and distinct from the rest of the parish for all purposes. At present,

(a) "To amend the laws concerning the burial of the dead in England."

(b) "To amend the laws concerning the burial of the dead in the Metropolis."

Southborough forms part of the parish, and, consequently, the Burial Board appointed for the parish, minus the Tonbridge Wells District, is well appointed for Southborough.

Denman, for the appellant.—Southborough has “a meeting in the nature of a vestry,” and may therefore appoint a separate Burial Board. But, however that may be, the Burial Acts do not warrant the appointment of a Burial Board for part only of a parish, and therefore the Board appointed for the parish of Tonbridge Wells *minus the Tonbridge Wells District was not well constituted. [*16 Stat. 18 & 19 Vict. c. 128 must be taken in connection with stat. 15 & 16 Vict. c. 85, the original Act, which, though at first confined to the metropolis, is extended to all England by stat. 16 & 17 Vict. c. 134, (a) s. 7. By stat. 15 & 16 Vict. c. 85, s. 10, “upon the requisition in writing of ten or more ratepayers of any parish,” “the churchwardens or other persons to whom it belongs to convene meetings of the vestry of such parish, shall convene a meeting of the vestry” to determine “whether a burial ground shall be provided” “for the parish.” And, by sect. 11, in case of a resolution being passed to provide a burial ground, “the vestry shall appoint” a certain number of “ratepayers of the parish to be the Burial Board of such parish.” By sect. 52, the word “parish” “shall mean every place having separate overseers of the poor, and separately maintaining its own poor.” In the *Queen v. Sudbury Burial Board*, E. B. & E. 264 (E. C. L. R. vol. 96), it was held that this definition extends the meaning of the word “parish” to such places, but does not exclude parishes which, for any reason, do not fulfil its conditions. By sect. 19, “The expenses incurred” “by the Burial Board of any parish” “shall be chargeable upon and paid out of the rates for the relief of the poor of such parish.” By sect. 23, “The vestries of any parishes which shall have respectively resolved to provide burial grounds,” “may concur in providing one burial ground for the common use of such parishes,” “and” “the Burial Boards appointed for such parishes respectively” are to act as one Board for providing and managing that common burial ground. By sect. 52, “vestry” “shall *mean [*17 the inhabitants of the parish lawfully assembled in vestry,” “except in” “parishes in which there is a select or other vestry elected under” certain specified Acts, “or under” “any local Act” “for the government of any parish by vestries, in which parishes it shall mean such select or other vestry.” Unless a select vestry in any parish has the entire government of the parish, the general vestry is the proper body to appoint a Burial Board for the parish; *The Queen v. Gladstone*, 7 E. & B. 575 (E. C. L. R. vol. 90), distinguishing *The Queen v. Peters*, 6 E. & B. 225 (E. C. L. R. vol. 88). It is clear from these enactments and decisions that, as a general rule, the vestry of a parish, in the sense in which the words “vestry” and “parish” are usually understood, is the body by which a Burial Board is to be appointed for the parish. Where a whole parish is without a Burial Board, the vestry of the whole parish may appoint a Board for the whole parish. By the subsequent Act, 18 & 19 Vict. c. 128, s. 8, the churchwardens of parishes for which no Burial Board has been appointed, may call vestry-meet-

(a) “To amend the laws concerning the dead in England beyond the limit of the Metropolis, and to amend” stat. 15 & 16 Vict. c. 85.

ings for providing burial grounds. Sect. 11 contains provisions for the appointment of one Burial Board for several united parishes, under circumstances which do not arise in the present case. Then follows sect. 12, which is relied upon by the other side as warranting the appointment of a Burial Board for part only of a parish, excluding another part which is a district. But there is no "vestry or meeting in the nature of a vestry" for the parish of Tonbridge, excluding Tonbridge Wells District, and including Southborough; the vestry of Tonbridge is the vestry of the whole parish. Nor is Tonbridge, minus Tonbridge Wells, plus Southborough, a "district" within *18] *the meaning of that section. How can a poor-rate be properly made for defraying the expenses of this Burial Board? The rate appears, on its face, to be made for part only of the parish; and is therefore bad. [Lord CAMPBELL, C. J.—Not so, if the Act gives power to make a rate for a part only.] Such a rate is not warranted by the Act.

Lord CAMPBELL, C. J.—I think that we may safely pronounce this Burial Board to be properly constituted. The question really depends upon whether or not Tonbridge Wells is entitled to have a separate Burial Board of its own. If Tonbridge Wells is so entitled (and being an Ecclesiastical District it is), it seems to me a necessary consequence that there must also be another Board for Tonbridge exclusive of Tonbridge Wells, and that stat. 18 & 19 Vict. c. 128, s. 12, if not in express terms, by implication, justifies the appointment of that Board.

WIGHTMAN, J.—I did not hear the whole of the argument, and therefore give no opinion.

ERLE, J.—I agree that this Burial Board was well constituted. Stat. 18 & 19 Vict. c. 128, s. 11 enacts that, in some instances, several parishes may have a common Burial Board. Then sect. 12 provides that a part of a parish, if it fulfils certain conditions, may have a Burial Board of its own; so that a district, such as Tonbridge Wells, may for this purpose be severed from the rest of a parish. Mr. *Denman* does not say that Tonbridge Wells had not a right to a separate Board, but argues that the severance of this district from the parish *19] incapacitates the rest of the parish from having also a *Board of its own. If so, the Board appointed for the district must be the Board for the whole parish of which the district is part. But it is clear, by implication from the statute, that where a parish is so large as to contain a district with a separate burial ground, the rest of the parish may also appoint a Burial Board of its own.

CROMPTON, J., concurred. Judgment for the respondents.

BRUNSDON v. ALLARD. June 9.

An attorney's right of lien for his costs on a judgment recovered by his client, is subject to the right of the parties to the action to make a bona fide compromise. The result of such compromise is that the lien is lost. But the lien may prevail against a collusive compromise made by the parties with the express object of defeating it.

The parties to cross actions, the plaintiff in each of which had obtained judgment, bona fide compromised the actions, after notice to one of them and his attorney from the attorney of the

other not to do so in prejudice of the latter's lien on his client's judgment. Held, that the attorney had no ground for claiming the equitable interference of the Court to enforce his lien.

BLACKBURN, in last Easter Term, obtained a rule, calling on the plaintiff, the defendant, and Sturgis, the provisional assignee of the Insolvent Court, to show cause why the defendant should not pay to Benjamin Hope, the plaintiff's attorney, the amount of his costs in this action, or why Hope should not be at liberty to issue execution on the judgment in this action; or why he should not be at liberty to bring an action on the judgment in the name of the party in whom the legal interest was vested.

It appeared from the affidavits on which the rule was obtained, that this was one of two cross actions. The writ in *Brunsdon v. Allard* was issued on 16th November, 1858, and the action was brought by the plaintiff, the defendant's tenant, to recover damages from the *defendant for wrongfully preventing the plaintiff from under- [*20 letting the demised premises. The writ in *Allard v. Brunsdon* was issued on 30th December, 1858. It was an action for two quarters' rent of the same premises. Judgment for 52*l.* 10*s.*, debt and costs, was signed, by consent, in *Allard v. Brunsdon*, on 8d February, 1859.

Brunsdon v. Allard was tried on 2d February, 1859, and the plaintiff obtained a verdict for 12*l.* 10*s.*; but judgment for 46*l.* 3*s.*, damages and costs in this action, was not signed till 9th April following. On 14th February, Allard took out a summons to set off, against the damages and costs in *Brunsdon v. Allard*, the debt and costs in *Allard v. Brunsdon*, and to refer it to the Master to take an account of the cross judgments, and to give his allocatur for such sum as might, on taking the account, be found due to either party. This summons was heard by Hill, J., who endorsed on it an order that the set-off should be allowed "subject to and without prejudice to the attorney's lien;" but no order was ever drawn up or served. A ca. sa. was issued on the judgment in *Allard v. Brunsdon*, under which Brunsdon was taken in execution on 24th February; whereupon he petitioned the Insolvent Court, and was opposed by Allard upon this judgment. Hope was Brunsdon's attorney in the actions, but Messrs. Lewis & Lewis were employed as his attorneys in the Insolvent Court. On 8th April, Messrs. Lewis & Lewis wrote to Messrs. Rogerson & Ford, Allard's attorneys, the following letter:

"Dear Sirs,

"*Brunsdon v. Allard.*

"To end all differences between plaintiff and defendant, we will pay, this morning, 10*l.*, and execute mutual releases as to costs and everything else.

"Messrs. Rogerson & Co.

"Yours faithfully,

"LEWIS & LEWIS."

*Allard assented to this proposal, and Brunsdon's petition [*21 was adjourned by the Commissioner of the Insolvent Court, in order that the terms might be carried out. Messrs. Rogerson & Ford, on 9th April, gave notice of the arrangement to Hope, who then stated that he should, notwithstanding, enforce against Allard the judgment in *Brunsdon v. Allard*. A written notice, signed by Brunsdon, not to issue execution against Allard, was served on Hope on the morning of 11th April, but, notwithstanding, Hope, on the same day, is

stued a fi. fa. to levy 46*l.* 8*s.*, under which the sheriff seized and kept possession of Allard's goods. Hope, on the same day, gave Allard and Messrs. Rogerson and Ford a written notice that he claimed a lien on the whole amount of damages and costs recovered in *Brunsdon v. Allard*, and that he should hold them personally liable if they carried out any arrangement with Brunsdon to his prejudice. On 15th April, Allard took out a summons to set aside the judgment and execution in *Brunsdon v. Allard*, which was heard on the following day, by Wightman, J., who made an order that the execution should be set aside; Allard agreeing to bring no action. On 18th April releases were executed by Brunsdon and Allard, and the 10*l.* was paid to Allard. On the same day Hope took out a summons against Allard and Sturgis, the provisional assignee of the Insolvent Court, calling on them to show cause why he should not be at liberty to proceed to enforce the judgment in *Brunsdon v. Allard*, to realize the amount of his lien on the damages and costs recovered, notwithstanding the insolvency of Brunsdon. Hill, J., who heard this summons, refused to make an order, and referred the parties to the Court. Whereupon this rule was obtained.

*22] **Manisty* now showed cause.—There is no means available to Mr. Hope, after what has happened, for enforcing the payment of his costs. The action of *Brunsdon v. Allard* has been finally put an end to by the release executed by the parties; which, as being made under the sanction of the Commissioner of the Insolvent Court, is an answer to any further proceedings on the judgment, or to any fresh action. The attorney has no such paramount right of lien on the judgment, for his costs, as that he should be allowed to defeat the perfectly fair and proper arrangement to which the parties have come. The other side seek to defeat a legal settlement of the action by setting up what, at most, is but an equitable right of the attorney. *Barker v. St. Quintin*, 12 M. & W. 441,† shows that an attorney's lien on a judgment is merely a claim to the equitable interference of the Court to have the judgment held as a security for his costs; and that where, as in the present case, his client has positively forbidden him to issue execution, he cannot do so even if it be established that the plaintiff and defendant colluded to deprive him of his lien. Here, however, there is no pretence for saying that any such collusion exists. In *Lloyd v. Mansell*, 22 L. J. N. S. Q. B. 110 (Bail Court), Erle, J., held that an attorney for a plaintiff is entitled to receive the amounts recovered in the action only as agent of and representing the plaintiff, and that to grant an application to enforce the attorney's lien, against the defendant, would be like allowing the attorney to bring an action in his own name, where his client was the contracting party.

*23] *Blackburn*, contrà.—It is conceded, for Mr. Hope, *that, if the arrangement between Brunsdon and Allard had been made bonâ fide, Mr. Hope would not be entitled to claim the equitable interference of the Court; but it is contended, on his behalf, that the whole proceedings between those persons, from the taking of Brunsdon in execution downwards, were contrived between them in collusion, for the express purpose of depriving Mr. Hope of his costs. If the Court is of that opinion, it will exercise its equitable jurisdiction

in his favour. In *Graves v. Eades*, 5 Taunt. 429 (E. C. L. R., vol. 1), it was held that, after a plaintiff had compromised the judgment-debt with the defendant, and had discharged an execution without providing for the costs of the plaintiff's attorney, the attorney could not of his own motion sue out another execution for the costs. But Gibbs, C. J., suggested that he "ought," "as in the case of *Welsh v. Hole*," 1 Doug. 238, which was cited, "to have come to the Court in the first instance, and have taken out a rule to show cause why the defendant should not pay him the costs." The present application is in compliance with that suggestion. In *Welsh v. Hole*, Lord Mansfield said, "An attorney has a lien on the money recovered by his client, for his bill of costs; if the money come to his hands, he may retain to the amount of his bill. He may stop it in transitu if he can lay hold of it. If he apply to the Court, they will prevent its being paid over till his demand is satisfied. I am inclined to go still farther, and to hold that, if the attorney give notice to the defendant not to pay till his bill should be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after *notice." This opinion of Lord Mansfield was followed in *Read v. Dupper*, 6 T. R. 361, where payment by the de- [*24 fendant's attorney to the plaintiff of the debt and costs recovered, after notice from the plaintiff's attorney not to pay till his bill had been first satisfied, was held to raise an equity on behalf of the plaintiff's attorney, which the Court enforced by making absolute a rule calling on the opposite attorney to pay over again to him the amount of his lien on such debt and costs. Lord Kenyon, in giving judgment, said, "The principle by which this application is to be decided was settled long ago, namely, that the party shall not run away with the fruits of the cause without satisfying the legal demands of his attorney, by whose industry, and in many instances at whose expense, those fruits are obtained. If indeed the money had been paid over bonâ fide to the plaintiff before notice from his attorney of his lien, such payment would have been good; but here the payment was made in violation of the notice, which cannot be suffered. In *Welsh v. Hole*, Lord Mansfield compared this to the case of an assignment of a chose in action, which indeed in legal strictness cannot be done; but still, according to the rules of equity and honest dealing, if the assignee give notice to the debtor of such assignment, he shall not afterwards be suffered to avail himself of a payment to the principal in fraud of such notice." Mr. Hope, by giving the notice of 11th April, has brought his case completely within these decisions. [Lord CAMPBELL, C. J.—Do you say that any payment by a defendant, after notice of lien given by the plaintiff's attorney, is invalid?] Any subsequent payment *made with the intention of defeating the [*25 attorney of his costs is so. The parties ought to have satisfied Mr. Hope's claim before they released each other. In *Bozon v. Bolland*, 4 Myl. & C. 354, Lord Cottenham held that a solicitor who, after the plaintiff had ceased to employ him, had enabled the plaintiff to recover a fund in the suit, had a lien on such fund, which, to the extent of the costs of that suit, he was entitled actively to enforce. In *Griffin v. Eyles*, 1 H. Bl. 122, it was held that an attorney has a lien, for his bill of costs, on money levied by the sheriff under an execu-

tion on a judgment recovered by the client, and is entitled to have it paid over to him on showing that the whole is due to him for his bill of costs. So, in *Ormerod v. Tate*, 1 East 464, it was decided that an attorney has a lien upon a sum awarded in favour of his client, as well as if it had been recovered by judgment; and if, after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself, and he will not be prejudiced by a collusive release by the plaintiff to the defendant. *Jones v. Turnbull*, 2 M. & W. 601,† shows that an attorney has a specific equitable lien on the moneys recovered by his client. The conduct of the parties in the present case, in carrying out the compromise after and in spite of Mr. Hope's notice to the contrary, is quite sufficient to satisfy the Court that they acted in collusion for the purpose of defeating Mr. Hope's just claim; therefore, in accordance with the authorities cited, the Court can and ought to interfere on Mr. Hope's behalf, by making this rule absolute.

*26] Lord CAMPBELL, C. J.—This is a rule calling upon *Allard to show cause why he should not pay to the plaintiff's attorney his costs in the action, or why the plaintiff's attorney should not be at liberty to issue execution, or to bring an action on the judgment. Practically, it is an appeal against the decision of my brother, Hill, at chambers. I think that he was right, and that he was not called upon to make the order asked for. Although an attorney has a lien for his costs, and, when his client has recovered judgment in an action, may apply the fruits of the action in payment of the sum which is due to him, that does not prevent the parties to the action from coming to a compromise, the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties, entered into by them in collusion to deprive the attorney of his costs. I see no sufficient ground for saying that the arrangement in the present case was such a juggle. Looking at the situation in which the parties were, we may well presume that the compromise was a *bonâ fide* one. We cannot make the rule absolute without affirming Lord Mansfield's doctrine that the attorney's lien became, by notice to the defendant, equivalent to an equitable assignment to the attorney of the judgment-debt. But we are not prepared to go that length.

WIGHTMAN, J.—No doubt an attorney has a lien for his costs upon the amount recovered in an action by his client. The question is, how that lien is to be enforced. If, in the progress of a suit, the attorney receives any fruits of the suit, he may detain them by reason of his lien. But the Court of Exchequer has held, in *Barker v. St. Quintin*, 12 M. & W. 441,† that even collusion between the *par-
 *27] ties to the suit gives him no right to put in force the process of the Court upon a judgment, of his own mere motion and without his client's consent. Perhaps there may be cases in which, if a case of collusion is thoroughly made out, the Court will, in the exercise of an equitable jurisdiction, interfere in the attorney's favour. But I think that no sufficient evidence of collusion exists in the present case. The affidavits do not convince me that the object of the arrangement between the parties to the suit was to deprive the plaintiff's attorney of his costs; though, no doubt, that was the result of it. The object appears to have been to make a *bonâ fide* compromise in order to get

rid of Allard's opposition to Brunsdon in the Insolvent Court. I therefore agree with the rest of the Court in thinking that Mr. Hope has made out no sufficient ground for our interference.

ERLE, J.—I am of opinion that this rule must be discharged. I regret that the indefinite language used by Lord Mansfield and by Lord Kenyon should have misled Mr. Hope, by inducing him to make this application to the Court. The plaintiff in an action is, ordinarily speaking, the proprietor of his own suit; and can deal as he chooses with the judgment obtained in it. "Lien," properly speaking, is a word which applies only to a chattel; "lien upon a judgment" is a vague and inaccurate expression, and the words "equitable lien" are intensely undefined. The attorney's right, however, certainly goes to this extent, that, if a conspiracy between the plaintiff and defendant, to defraud the attorney of his costs, is clearly made out, the Court will interfere to prevent it. It is somewhat difficult to say what would amount to such a conspiracy; suffice it to say that here no such [*28 conspiracy has been shown.

CROMPTON, J.—I am of the same opinion. This is rather a strange application. In extreme cases we might perhaps interfere, but this is not a case of that kind. I do not look upon a settlement between the parties in two cross-actions as being the same thing as setting off one of the judgments against the other: which, undoubtedly, could not be done to the prejudice of the attorney's lien.(a) Nor is the attorney's lien equivalent to the equitable assignment to him of the judgment-debt. It is a right subject to that of the parties to the suit to make a bonâ fide compromise between themselves. Each party is, for that purpose, dominus litis; and the Court will not interfere with any fair settlement that they may come to, although it will probably restrain them from carrying out a collusive arrangement made on purpose to defraud the attorney of either. In this case it does not appear that there was any unfairness or any collusion.

Rule discharged.

(a) See Rules of Practice, Hilary, 1853, No. 63.

*EDWARDS and Others, Assignees of W. C. OAK and C. H. SNOW, Bankrupts, v. GLYN and Others. June 10. [*29

O. & S., bankers at B., being in want of funds to meet an expected run upon their bank, obtained from some friends a written guarantee for 3000*l.*, upon the strength of which defendants, bankers in London, advance to O. & S. 3000*l.* The guarantee, S. stated in evidence, was signed by the sureties on the understanding with O. & S. that the money should be returned if they found themselves, notwithstanding the advance, unable to meet the run. Defendants knew nothing of this understanding. S. having received from defendants at London the 3000*l.* in notes and gold, in a box, took the money down to B., and saw O., his partner; and, finding that it was impossible to meet the run, O. & S. discussed the propriety of returning the money. While discussing it they received a letter from F., one of the sureties, saying that, as the case was hopeless, O. & S. could not honourably retain the money, and that it ought to be returned: and F. afterwards, in an interview, again urged upon them the return of the money. S., in evidence, stated that this letter and the subsequent application from F. operated upon their minds in coming to the conclusion to return the money. The box containing the money was returned to the defendants unopened: O. & S. suspended payment the next day, and afterwards became bankrupts.

In an action by the assignees of O. & S. to recover from the defendants the 3000*l.*;

Held (on a special case stating the facts), that O. & S., in returning the money, were influenced not solely by their own wish, but also by the application from the surety: and that therefore the return of the money was not purely voluntary, and did not amount to a fraudulent preference.

Held also, by Erie and Crompton, Js., that the 3000*l.* was advanced on the specific understanding, and clothed with the specific trust, that it should be returned if the run could not be met; that, as the purpose for which it was advanced had failed, O. & S. had only a legal, and not also an equitable, title to the money: and that therefore the interest in such money did not pass to their assignees.

ACTION for money payable by defendants to plaintiffs, as assignees as aforesaid; for money received by defendants to the use of plaintiffs, as assignees as aforesaid: and also for that defendants, after the said bankrupts became bankrupts, converted to their own use and deprived plaintiffs of the possession of divers notes and coin of plaintiffs, as assignees as aforesaid; and also for that defendants, before the said bankrupts became bankrupts, converted to their own use and deprived the said bankrupts of the possession of divers notes and coin of the said bankrupts as aforesaid. Pleas. 1. That plaintiffs *30] were not such assignees as alleged. 2. To the first *count, that defendants never were indebted as alleged. 3. To the second and third counts, Not guilty. 4. To the second count, that the said notes and coin were not the plaintiffs' as such assignees as alleged. 5. To the third count, that the said notes and coin were not the said bankrupts' as alleged. Issue on all the pleas.

The cause came on to be tried at the Sittings for London after Hilary Term, 1859, before Lord Campbell, C. J., when a verdict was found for the plaintiffs for 3000*l.*, subject to the opinion of the Court on a special case, which was substantially as follows:—

The bankrupts, Messrs. Oak & Snow, carried on the business of bankers, under the firm of Oak & Snow, at Blandford, in the county of Dorset. The defendants carried on the business of bankers in Lombard Street, London, under the firm of Glyn, Mills & Co., and in that capacity acted as the London agents for the banking establishment of the bankrupts at Blandford. At the trial of the cause, the bankrupt, C. H. Snow, was called on behalf of the plaintiffs. It was agreed that the facts of the case were to be taken to be those therein specifically set forth, and also such as the Court, placing themselves in the situation of a jury, should think fit to infer therefrom, and from the evidence given by the said witness and documentary evidence as hereinafter set forth, subject to the objection, if valid, of the admissibility in evidence of the statement alleged by the said witness, in his cross-examination, to have been made by him to the guarantors at the time of their respectively signing the guarantee mentioned in his examination: and also of the admissibility in evidence of the contents of a letter alleged by the said witness, in his cross-examination, to have been received by him from Mr. Farquharson on *31] *the night of 12th February, 1858, and of all evidence relating thereto respectively; and which statement and letter, and all evidence in the said examination relating thereto respectively, were, if not admissible, to be considered as thrown out of the case. The said witness, C. H. Snow, on his examination in chief, stated as follows: "W. C. Oak and I carried on the business of bankers at Blandford in copartnership, under the firm of Oak & Snow, from 1848, and

the defendants were our London agents. For some time before and in February, 1858, we had, as customers of our bank, a firm carrying on business at Blandford under the name of Barnes & Sons; and, in February, 1858, Barnes & Sons stopped payment, being indebted to our firm at that time in about 11,000*l*. In consequence of the failure of Barnes & Sons there was a run upon our bank, and moneys were not paid in as usual to the credit of accounts, and the resources of the bank were cramped in consequence. About the time of the failure of Barnes & Sons our firm was also indebted and otherwise liable to the defendants, on our agency account, to a considerable amount: and, on 7th February, 1858, our firm received by post the following letter from the defendants:—

“ ‘Dear Sirs, Lombard Street, Feb. 6, 1858.

“ ‘Your general account this day is 3300*l*., Dr., which includes 3000*l*. of Barnes, Cr. Also we hold under discount several of their bills. This state of things being by no means satisfactory to us, we have to request you will, without delay, remit us further ample security.

“ ‘We remain, dear Sirs,

“ ‘Your very obedt. Servts.,

“ ‘GLYN, MILLS & Co.

“ ‘To Messrs. Oak & Snow.

“ ‘(Private).’

*“On 9th February, 1858, our firm received by post the following letter from the defendants:— [*32

“ ‘Dear Sirs, London, Feb. 8th, 1858.

“ ‘We are surprised to have no intimation from you upon the subject of Messrs. Barnes & Co.’s affairs. We wrote you on the 6th, and shall hope to-morrow to hear from you as to security or guarantee for any balance of account which may be due to us. The position which your account has assumed in consequence of Barnes & Sons’ failure renders it our painful duty to state that we must decline, unless upon satisfactory securities, to increase the advance upon your account.

“ ‘We remain, dear Sirs, faithfully,

“ ‘P. GLYN, MILLS & Co.’

“On 8th February, 1858, our firm sent the following letter by post to the defendants:—

“ ‘Blandford, 8th February, 1858.

“ ‘Gentlemen,

“ ‘We will attend to your request as quickly as possible, but we have been a great deal inconvenienced by the return of Barnes’s wool bills on Smith & Hubbard. We had hoped to have waited for a better price for The Chester and Holyhead, The North British and Aberdeen, in your Mr. George G. Glyn’s name: but we will now thank you to sell them at the best price you can for money, and credit our account therewith.

“ ‘We remain, Gentlemen, your obedt. Servts.

“ ‘Messrs. Glyn & Co.

(Signed) “ ‘OAK & SNOW.’

“On 9th February, 1858, our firm sent the following letter by post to the defendants:—

“ ‘Gentlemen, Blandford, 9th Feb., 1858.

“ ‘We regret your inquiry respecting Barnes & Sons’ acceptances to Smith should have remained unanswered *by Saturday’s post, but we had some difficulty in ascertaining the true [*33

position of them. We presume, however, the answer which we wrote you yesterday will explain.

“ ‘The two remaining notes of Barnes & Sons for 1500*l.* and 1000*l.*, in your hands, will be covered; and the whole of the other bills and acceptances bearing their endorsement are perfectly good, and will be paid.

“ ‘Barnes & Sons themselves, to our very great surprise, have been obliged to stop; and we fear it will be some little time before it can be ascertained how their affairs will turn out. We are preparing to send you a covering guarantee, which we hope will be considered amply sufficient for anything which we may find it necessary to draw for. In the meantime our advices shall be confined within as narrow a limit as possible.

“ ‘We remain, Gentlemen, your obedt. Servts.,
“ ‘Messrs. Glyn & Co. (Signed) “ ‘OAK & SNOW.’

“ ‘On 10th February, 1858, our firm sent the following letter by post to the defendants:—

“ ‘Blandford, 10th February, 1858.

“ ‘Gentlemen,

“ ‘The guarantee we referred to in our private letter of yesterday has been signed by five of our friends for 1000*l.* each, and has been agreed to be signed by three others. We propose asking in all eight or ten to join, and we hope to forward it complete by Friday or Saturday’s post.

“ ‘We remain, Gentlemen, your obedt. Servts.,
“ ‘Messrs. Glyn & Co. “ ‘OAK & SNOW.’
“ ‘London.’

*34] “ ‘On 11th February, 1858, our firm sent the following letter by post to the defendants:—

“ ‘Blandford, 11th February, 1858.

“ ‘Gentlemen,

“ ‘Our friend Mr. Tucker will present to you to-morrow the guarantee we referred to, signed by eight of our friends, which we hope will be satisfactory: and, if so, if you will hand to Mr. Tucker 2000*l.* in gold and 1000*l.* in Bank of England notes, fives and tens, we shall feel obliged. We do not at all anticipate that we shall require to make use of anything like this sum; but, Saturday being our market day, we wish to be prepared, Barnes & Sons’ failure having caused some excitement in the neighbourhood.

“ ‘We expect one or two other signatures to be added to the guarantee in the course of a day or two, and

“ ‘We remain, Gentlemen, your obedt. Servts.,
(Signed) “ ‘OAK & SNOW.’

“ ‘Mr. Tucker, whose name is referred to in the last-mentioned letter, was the solicitor of our firm, and the guarantee referred to in that letter was a guarantee dated 10th February, 1858, addressed to the defendants, and signed by the parties whose names are respectively subscribed thereto; and was as follows:—

“ ‘To Messrs. Glyn & Co., Bankers, London.

“ ‘Gentlemen,—In consideration of your agreeing to advance money and to give credit to Messrs. William Coventry Oak and Charles Hastings Snow, of Blandford, on the guarantee hereinafter contained,

we, the undersigned, do hereby jointly and severally guaranty to you the payment of any moneys which shall become due to you from the said William Coventry Oak and Charles *Hastings Snow; [*35 Provided that we are not separately or individually to be liable for more than one thousand pounds each under or by virtue of this guarantee.

“‘Dated this tenth day of February, 1858.

(Signed) “‘J. J. FARQUHARSON,

“‘ROBT. FARQUHARSON,

“‘ANTHONY HUXTABLE’ [and five others.]

“On the evening of 11th February, 1858, I went from Blandford to London, accompanied by Mr. Tucker; and on 12th February, 1858, Mr. Tucker and I then being in London, I requested Mr. Tucker to go to the banking-house of the defendants in Lombard Street, and to deliver to them the said guarantee, and to receive from them 3000*l.*, that is to say, 1000*l.* in Bank of England notes and 2000*l.* in sovereigns and half-sovereigns; and on the afternoon of the same day he delivered to me a parcel, which he said he had received from the defendants, and which he said contained 3000*l.* After receiving the said parcel from Mr. Tucker, and on the same day, I returned from London to Blandford, taking the said parcel with me. I arrived at Blandford at eleven o'clock on the night of the same day, and proceeded at once to the private residence of my partner, Mr. Oak, taking the said parcel with me; and at Mr. Oak's house there was a discussion between Mr. Oak and me respecting the affairs of the Bank. We came to a resolution there that night. Directly I saw Mr. Oak, when I heard what had been passing on that day, we came to the determination of returning the 3000*l.* unopened. The reason why we came to that determination was, that Mr. Oak had told me that large demands had been made upon the Bank that day, which he had in part satisfied, and in part put off until the following day, of *amounts that would have far exceeded the 3000*l.* On that we [*36 found that it would be quite impossible to use the money honourably, so we determined to return it. At the same time we also came to the determination not to carry on the business of the Bank, but to suspend payment the next morning; and the next morning we did suspend payment accordingly. At the time of our coming to these determinations our firm was insolvent. Mr. Oak and I afterwards, and on the same evening, went to the house of Mr. Farquharson, where I was then staying on a visit. Mr. Farquharson was my brother-in-law, and was one of the parties who had signed the guarantee before referred to; and at the house of Mr. Farquharson, on the same evening, a conversation took place between Mr. Farquharson, Mr. Oak and me, in the course of which Mr. Farquharson told us that it would be impossible for us to use the said 3000*l.*, because he knew, from what he had heard, that it would be impossible for us to use the money with honour: and that was the opinion of Mr. Oak and myself. He pressed on us the necessity of returning the money. On the morning of the following day, 13th February, 1858, I went from Blandford to London, taking with me the said parcel unopened.

“On my arrival in London on the same day, I proceeded at once to the banking-house of the defendants in Lombard Street, and went

into the private room of the bank, and there saw Mr. George Glyn, one of the defendants, and put the bag containing the 3000*l.* on the table, and requested him to give me up the guarantee before referred to, which he refused to do, saying that he must hold it to cover any balance that might arise from the non-payment of any of the bills. *37] I protested against *this, but I left the money. On 17th February, 1858, our firm sent the following letter by post to the defendants:—

“Gentlemen,

“Blandford, 17th February, 1858.

“We perceive, by the account which we received yesterday, that you have passed through it the 3000*l.* bullion delivered to Mr. Tucker on Friday. This appears like mixing it up with the general account, which we think ought not to have been done, as that advance was intended to form a separate transaction. The guarantee was obtained solely with the object of securing any advance you made to us after the same was deposited with you, the object of our friends being to provide us with immediate available means to enable us to go on. The 350*l.* bullion sent down by Mr. Kentish we consider is a fair charge upon the guarantee, as he left it only on the assurance that it was gone up; but it was fully understood by both of us that the guarantee was to cover only future advances. When we came fully to consider the situation we were in, having already experienced a considerable pressure, and a prospect of it increasing in force, we came to the resolution of suspending payment rather than trench upon the guarantee: and we and our friends fully believed that, when we delivered the 3000*l.* to you unopened, and offered to repay the 350*l.*, the guarantee would be given up. If the guarantee had been given to cover other securities, we may as well have retained the gold, which we think would have been ample to have carried us through the run. We hope, therefore, you will see the intention of the transaction, and that, both for the tranquillization of our minds, as well as for the ends of honour and justice, you will at once return *38] us the guarantee. If *any payments were made or liability entered into by you on the Friday, these would also probably be a fair charge upon it.

“Anxiously waiting your reply,

“To Messrs. Glyn & Co.

“London.

“We remain, &c.,

“OAK & SNOW.”

“And on 19th February, 1858, our firm received by post the following letter from the defendants:—

“Dear Sirs,

London, February 18, 1858.

“We have received your letter of the 17th, and cannot but express our surprise at its contents.

“The guarantee which you promised to send us was as cover for the bills running and as further security for the account: it came into our hands upon that understanding, and was acted upon accordingly.

“The 3000*l.* sent on the 12th was treated by us in the ordinary course of business, and went in the usual way through our books. No request was made to us to treat it otherwise, or to open any new or separate account. The 3000*l.* when returned to us on Saturday morning, was placed to the credit of the account, at the request of Mr. Snow, as money returned unopened.

"We can of course say nothing as to the understanding which you may have had with your friends, and can only judge of the transaction by the facts known to us.

"We remain, dear Sirs, yours faithfully,

"GLYN, MILLS & Co.

"Messrs. Oak & Snow, Blandford."

The same witness, on cross-examination, stated as follows: "Our firm had anticipated a run on our Bank on Saturday, 13th February, 1858. Saturday was the market day at Blandford, but we had anticipated that *the 3000*l.* would be sufficient to carry us over [*39 the run at that time, that is, when I went to London, on Friday, 12th February, 1858. Previous to making the application to the defendants for the 3000*l.*, our firm had applied to several of our friends to sign the guarantee before referred to, and amongst others, to Mr. Huxtable and Mr. Farquharson. At the time the guarantors signed that guarantee, I told each of them that it was not to be made use of unless we saw clearly that it would carry us over the crisis. When Mr. Tucker brought me the 3000*l.* which he received from the defendants, it was in a box, fastened up, and it remained in that state until it was returned by me to the defendants. When I returned to Blandford from London on the night of Friday, 12th February, I went direct to Mr. Oak's private residence, and did not go to the Bank at all. About a quarter of an hour after my arrival at Mr. Oak's residence, and before we had come to any resolution, and whilst we were discussing about it, I received a letter from Mr. Farquharson. That letter is lost. The purport of that letter was begging us not to make use of the 3000*l.*, and saying that we could not do so safely or honourably, and that the money ought to be returned immediately. That letter strengthened my own opinion. It concurred with my own judgment. Of course it strengthened my mind. It certainly operated on my mind in coming to the conclusion to take back the money. I handed the letter to my partner. Mr. Farquharson was aware that I had gone up to London for the money. We went to Mr. Farquharson's house as before mentioned, about an hour after I had received that letter, and we left the money at Mr. Oak's private residence. When we arrived at Mr. Farquharson's, we again *discussed the question, and he pressed on us the necessity of [*40 returning the money. Mr. Farquharson's letter, and what took place when I saw him, strengthened me in my resolution to return the money. After I had been at Mr. Farquharson's house some time, the box containing the 3000*l.* was brought by my servant from Mr. Oak's to Mr. Farquharson's house, where it remained until I took it to London the next morning. Mr. Farquharson went to London with me. When I went to the defendants on 13th February, the defendant, Mr. George Glyn, when I asked for the guarantee, insisted on keeping it to meet any bills that might be payable, and I protested against it, and pointed out to him that the guarantee was only for future advances. Before I left him he gave me his word that the 3000*l.* returned by me should be put against the advance of that sum on 12th February."

The same witness, on re-examination, stated as follows: "After my return to Blandford, on the night of Friday, 12th February, it was

my opinion that the money should be returned. That opinion was formed on the statement of Mr. Oak to me on my arrival." Mr. Tucker, referred to in the evidence of the said witness as aforesaid, did, in fact, deliver the said guarantee to the defendants on 12th February, 1858; and at the same time the defendants did, in fact, deliver to the said Mr. Tucker, and the said Mr. Tucker received from the defendants, the said parcel or box referred to in the evidence of the said witness; and at the time of the delivery of the said parcel or box by the defendants to the said Mr. Tucker, and of the receipt thereof by the said Mr. Tucker from the defendants, and also at the time of the delivery thereof by the said Mr. Tucker to the said witness, and of the receipt thereof by the said witness from the *41] said Mr. *Tucker, and also at the time of the delivery thereof by the said witness to the defendant, Mr. George Glyn, as stated in the evidence of the said witness respectively as aforesaid, the said parcel or box did in fact contain 3000*l.*, that is to say, 1000*l.* in Bank of England notes, and 2000*l.* in sovereigns and half-sovereigns.

The firm of the bankrupts did not resume their said business after the determination come to by them on the night of 12th February, 1858; and the position of the said firm remained unaltered from that time until and at the time of the adjudication of bankruptcy hereinafter mentioned.

Messrs. Oak & Snow were, on 17th March, 1858, adjudged bankrupts on their own petition: and the plaintiff Edwards was appointed official assignee and the other plaintiffs were appointed creditors' assignees.

On 2d July, 1858, the assignees, through their solicitors, demanded from the defendants the 3000*l.* returned to them by the bankrupts as aforesaid; the defendants refused to comply with such demand, and the action was brought to recover the said 3000*l.*

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in such action. If the Court should be of opinion in the affirmative, the verdict was to stand. If the Court should be of opinion in the negative, a verdict was to be entered for the defendants.

Collier, for the plaintiffs.—The repayment to the defendants of the sum advanced by them was a fraudulent preference by the bankrupts. It was a payment voluntarily made, in contemplation of bankruptcy, and in favour of one creditor to the prejudice of the rest. It *42] *was a payment, and not a mere return of the actual notes and coin. The defendants contend that this advance was a separate transaction, not part of the ordinary course of business between themselves and the bankrupts. But that is immaterial; the bankrupts and the defendants were, as regards this advance, in the position of debtor and creditor; and the 3000*l.*, when advanced, was placed by the defendants to the credit of the bankrupts' general account. The payment, further, was made, not only in contemplation of bankruptcy, but voluntarily: for the request by one of the sureties, that the money should not be used, cannot be considered as pressure; and, moreover, the bankrupts had, before such request was made, determined to return the money. Further, the payment was to the advantage of the defendants as creditors, to the prejudice of the other credit-

ors. It is true that the parties immediately benefited by the return of the money were the sureties, and not the defendants. But a voluntary payment, in contemplation of bankruptcy, by the debtor, the effect of which is to defeat the equal distribution of his property, is a fraudulent preference, though he may not have intended such payment to benefit any particular creditor: *Marshall v. Lamb*, 5 Q. B. 115 (E. C. L. R. vol. 48). And the defendants here were benefited, in not having to sue the sureties. [CROMPTON, J.—If the surety is a party benefited by the payment, surely importunity by him is sufficient to prevent the payment being a fraudulent preference.] It certainly seems to have been considered by the Court, in *Strachan v. Barton*, 11 Exch. 647,† that it is not necessary that the person exercising the importunity should have the immediate right of enforcing the payment. But it is *necessary that he should be a person who [*43] would be damnified by the non-payment; and here the sureties would not necessarily be damnified. [ERLE, J.—In *Mogg v. Baker*, 4 M. & W. 348,† it was held that, if the payment originates with the debtor, it is a fraudulent preference; but that a mere bonâ fide demand by the creditor, without any pressure, is sufficient to support a payment made in consequence.] *Cook v. Rogers*, 7 Bing. 438 (E. C. L. R. 20), shows that even a threat of arrest by the creditor does not necessarily prevent the payment being voluntary, and that it may nevertheless be left to the jury to say, looking at the motives and state of mind of the bankrupt at the time of payment, whether the payment was voluntary or not. The question here is whether the bankrupts, in making this payment, were substantially and mainly induced (to use the expression adopted by the Court in *Tatton v. Wade*, 18 Com. B. 371 (E. C. L. R. vol. 86), by the application and representations of the surety. The evidence shows that they were not. *Brown v. Kempton*, 19 L. J. N. S. C. P. 169, and *Cook v. Pritchard*, 6 Sc. N. R. 34, are to the same effect, and show that, even where there is pressure by the creditor, the payment by the bankrupt, if not induced by that pressure, but made voluntarily and in contemplation of bankruptcy, is a fraudulent preference.

Bovill, contra.—First; as the bankrupts were not absolutely entitled to the money, but held it on a sort of equitable understanding that it was to be returned on the contingency, which occurred, of the advance not proving sufficient to enable them to avert suspension of payment, their property in it was not such as to pass to their assignees. The case finds that, when the guarantee *was signed, the sureties [*44] were told by the bankrupts “that it was not to be made use of unless” they “clearly saw their way through the run.” The return of the money, therefore, when a failure became inevitable, was only carrying out the original arrangement. And it was held, in *Toovey v. Milne*, 2 B. & Ald. 683, that where money was advanced to a bankrupt for a particular purpose, an implied stipulation was raised for its repayment if that purpose failed; and that the repayment by him, on the failure of that purpose, was protected as against his assignees. *Moore v. Barthrop*, 1 B. & C. 5, is a decision to the same effect. In *Mogg v. Baker*, 3 M. & W. 195,† the decision in which case, in error 4 M. & W. 348,† has been referred to by the Court, it was laid down by Parke, B., that the assignees of a bankrupt take only such property

as the bankrupt was equitably, as well as legally, entitled to at the time of the bankruptcy. The money here was clothed with a trust; and it is immaterial whether the defendants knew of this or not.

Secondly, even if the assignees would have had a right to the money if the payment were void, the payment here was not void. There was no fraudulent preference. It is clear that the wishes and expressed opinion of the surety influenced the bankrupts in paying it over to the defendants. That is sufficient to prevent the payment being void as against the assignees, whether it was made under actual pressure or not: *Mogg v. Baker*, 4 M. & W. 348.† And a surety has sufficient interest in the money advanced to give an application by him the same effect as an application by an ordinary creditor. In *Van Casteel v. Booker*, 2 Exch. 691, 706,† Parke, B., in delivering the judgment of the Court, says that “the law as to a fraudulent preference of a particular creditor had *been laid down by my brother Rolfe so as to
*45] operate too favourably for” the assignees, “inasmuch as his statement of the law was likely to lead to the inference that, to render a preference on the eve of bankruptcy valid, a threat or pressure, with an immediate power of rendering it available by taking legal steps, was necessary. This is certainly not so: for a surety for the bankrupt, or one to whom a debt is due but not payable, may obtain a valid preference though he has no present power of proceeding against the bankrupt. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors entitled under the fiat, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary.” So, in *Strachan v. Barton*, 11 Exch. 647,† Alderson, B., says, “I apprehend that a voluntary payment is a payment simply by the act and will of the party making it, and that, if there is anything to interfere with or control this will, then it is not a voluntary payment.” And *Brown v. Kempton*, 19 L. J. N. S. C. P. 169, is an authority to show that, where such interference or control operates, the fact of the payment being also made with the concurrence and will of the debtor, and in contemplation of bankruptcy, does not make such payment invalid.

Collier, in reply.—It is a fallacy to say that here the money was clothed with a trust; the condition was, that the guarantee should not be used unless a failure could be thereby averted. The guarantee was used: and the money advanced by the defendants upon the
*46] strength of *it was parted with, by them, unconditionally; so that they, as between themselves and the bankrupts, had an unconditional right to be repaid. [CROMPTON, J.—Suppose the loan had been by a check on the defendants’ bank.] That, no doubt, might have raised the distinction, pointed out by the Court in *Moore v. Barthrop*, 1 B. & C. 5 (E. C. L. R. vol. 8), between a simple advance of money and a check given for a specific purpose. [CROMPTON, J.—Had the bankrupts more than a right to this money for a specific purpose only?] As between themselves and the defendants, they had. [CROMPTON, J.—If any one but the bankrupts had an equitable right to the money, it would not pass to the assignees.] There was no equitable right in the sureties to compel the return of the money to the defendants. And, further, that return, though made

for the purpose of saving the sureties from loss, was not made at their instance, and was therefore a fraudulent preference.

LORD CAMPBELL, C. J.—I am, of opinion that the defendants are entitled to judgment. My opinion does not rest on the ground that the bankrupts were bound, in equity, to return the money on the failure of the purpose for which it was advanced: and, if the repayment had been made in notes and coin other than the identical notes and coin advanced, I should still have thought that this action was not maintainable. The ground upon which I rest my judgment is, that this payment by the bankrupts was not a voluntary payment, but was made under what, in the legal sense of the word, may be called pressure; not from the defendants, the immediate creditors, but from the sureties, under whose guarantee *the money had been advanced. A request by a surety that the money for [*47 the payment of which he is ultimately responsible may be paid over by the debtor to the creditor, prevents such payment by the debtor from being a voluntary payment just as much as a request by the creditor himself. Here the sureties had clearly an interest in the money being returned, on the failure of the specific purpose for which it was advanced, and in its being applied to the discharge of the debt of 3000*l.*; for if it were not so applied, they would be liable on their guarantee to the defendants; while, if it were so applied, their liability would cease, as it had been stipulated that the guarantee should cover future advances only. Then, do the facts of the case show any demand or proposal by the sureties, that the money should be so returned, which operated upon the mind of the bankrupts at the time when they returned the money? I think they do. There is good reason for thinking that, but for Farquharson's letter, the money would not have been returned; at all events that that letter had its effect upon the mind of the bankrupts, although they might, independently, have been inclined, as a matter of honour, to return the money. The application by the sureties, therefore, was one operating element, if it were not the exclusive one, in the return of the money; so that according to the rule laid down in *Brown v. Kempton*, 19 L. J. N. S. C. P. 169, a case which I think was most properly decided, the payment was not voluntary.

WIGHTMAN, J.—I am of the same opinion. The money was advanced by the defendants solely on the credit of *the sureties, who had given a guarantee in order to procure for the bank- [*48 rupts money for a specific purpose; and on that purpose failing, the sureties press the bankrupts to return the money. In my opinion that prevents the subsequent return of the money by the bankrupts from being a voluntary payment. The evidence shows that the pressure was considerable. Mr. Farquharson, one of the sureties, not only writes to request the return of the money, but afterwards, in an interview, gives it as his opinion that the bankrupts were bound, in honour, to return it. I have no doubt that this pressure was one of the causes which induced the bankrupts to return the money; and the case therefore comes within the principle of those other cases in which it has been laid down that a payment, not made simply and solely on the motion of the debtor himself, is not a voluntary payment within the meaning of the Bankruptcy Law.

ERLE, J.—I also am of opinion that the defendants are entitled to our judgment. I concur with the Lord Chief Justice and my brother Wightman in thinking that the payment was not voluntary; and I will not add any more on that head. But I also think that this was a specific advance for a specific purpose, on the understanding, between the bankrupts and their sureties through whom it was procured for them, that the money, if not used for that purpose, should be returned. The money was required to meet a run upon the bankrupts' bank on a particular day: and the giving of the guarantee by the sureties, the promise to them by the bankrupts that they would use the money only if it would enable them to meet the run, and the *49] ultimate *advance by the defendants of the money, on the strength of the guarantee, form, in my opinion, one transaction. It is very much as if, before the bank opened on the day on which the run was expected, the sureties had brought 3000*l.* to the bank, and said "There is 3000*l.*; use it, if it will carry you through the run; if it will not, do not touch it; whether it will or not we leave to your judgment." If, as soon as the bank opened, the run was obviously to an extent which the 3000*l.* would not meet, would the bankrupts have been entitled to retain this 3000*l.* for the benefit of their general creditors? The case is entirely within the principle of *Toovey v. Milne*, 2 B. & Ald. 683, where 120*l.* had been advanced to the bankrupt, before bankruptcy, for the purpose of settling with his creditors; and he, no settlement having been made, returned part of the money. Abbott, C. J., held that, as the money was advanced for a special purpose, and was therefore clothed with a specific trust, the assignees of the bankrupt had no right to it, and that the repayment of it, on the failure of the purpose for which it was advanced, was protected as against them. At one time the tendency of the Courts was in favour of the assignees of a bankrupt, and of swelling as much as possible the assets for distribution among the general body of creditors. Great endeavour was made by Parke, B., to stem this tide. *Mogg v. Baker*, 4 M. & W. 348,† and *Van Casteel v. Booker*, 2 Exch. 691,† are instances of this endeavour: and in *Brown v. Kempton*, 19 L. J. N. S. C. P. 169, the question as to what constitutes a voluntary payment was again most fully discussed, and a rule was laid down which entitles the defendants, upon that point also, to our judgment.

*50] *CROMPTON, J.—I have known the tide, to use my brother Erle's expression, turn more than once, as regards the rights of assignees and creditors: what I wish is to keep as much as possible to the decisions establishing the principle set up at the last turn of the tide. Both the questions raised in the present case are of great commercial importance; and on both I am disposed to think, with the rest of the Court, that the defendants are entitled to judgment. The first question, which was properly kept distinct by Mr. Bovill from the second, is, not what are the rights of the defendants, but what the rights and liabilities of the bankrupts are, and whether third parties, the sureties, have such an equitable interest in the money as to prevent the assignees from having any right to interfere. I think the case falls within the principle laid down in *Toovey v. Milne*, 2 B. & Ald. 683: a case which, although the point in it was decided without

much discussion, upon a motion for a new trial, seems to me to lay down a very useful and proper rule of law. The machinery by which the advance was obtained in the present case is somewhat different: but this fact is common to both cases, that the advance was made for a specific purpose only, and on the understanding that it should be used only for that purpose. As soon as that purpose failed, the sureties had a right to say "We gave our guarantee on the understanding that it should be used for a specific purpose: and, that purpose having failed, you are bound to return the money advanced upon that guarantee." The advance being, to use the expression of Abbott, C. J., in *Toovey v. Milne*, 2 B. & Ald. 688, clothed with a specific trust, the *bankrupts, though they might have a legal, had not [*51 an equitable right to use the money for any other purpose; and equity would, I think, have interfered to prevent them from doing so. Therefore, on the principle that the assignees of a bankrupt take only property to which the bankrupt has both a legal and an equitable right, the plaintiffs have no ground of action. As to the second point, I am of opinion that, according to the rule of law laid down in *Brown v. Kempton*, 19 L. J. N. S. C. P. 169, there was no fraudulent preference. I think that the return of the money was the result partly of a desire on the part of the bankrupts to do what was honourable (though the payment would, if *solely* so produced, have been, in law, a fraudulent preference) and partly of the representations and the letter of Mr. Farquharson, one of the sureties. "That letter," Mr. Snow, one of the bankrupts, stated, "strengthened my own opinion." "It certainly operated on my mind in coming to the conclusion to take back the money." The bankrupts therefore, not being influenced solely by their own wish in returning the money, did not commit a fraudulent preference. This question was carefully discussed by Wilde, C. J., in his summing up in that most important case of *Brown v. Kempton*, which I have already mentioned: and also in the judgment of the Exchequer Chamber, in the same case, delivered by Parke, B., in which it is laid down that "if the payment was made under the influence of the pressure and importunity of the defendant" (the creditor) "and also with a desire to give him a preference in the event of a bankruptcy," there was no fraudulent preference. The principle, in short, is that the payment *must [*52 be perfectly voluntary; and a payment cannot be considered as perfectly voluntary when other motives tend to bring it about besides the debtor's own wish. The decision in *Strachan v. Barton*, 11 Exch. 647,† follows the same principle as *Brown v. Kempton*, 19 L. J. N. S. C. P. 169; and is also an authority in favour of the contention of the defendants in the present case, and which I consider to be clearly right, that pressure by a surety prevents the payment from being voluntary as much as pressure by a creditor. I think, therefore, that the defendants are entitled to our judgment upon both grounds.

LORD CAMPBELL, C. J.—I wish to be understood as by no means differing from the rest of the Court as to the legal effect, upon the rights of the assignees of a bankrupt, of an advance made to him for a specific purpose, and clothed with a specific trust. But, as I did not feel quite clear that the facts of the case showed an advance on

those terms, I thought it better to ground my judgment upon the other point only.

Judgment for the defendants.

Upon the subject of fraudulent preference the current of judicial opinion, which has during a long period set towards a bald construction of the statutes of bankruptcy without the addition of glosses, has since the date of *Edwards v. Glyn* found its natural boundary in the recent case of *Bills v. Smith*, 11 Jur. N. S. 155. There in April, 1862, the bankrupt applied for a loan to his brother the defendant, who procured the money thus advanced from his bankers upon stipulating to return it on the 1st of the following July. The bankrupt, being informed of the terms upon which his brother had obtained the money, without any pressure or solicitation from the defendant repaid him the amount borrowed on the 1st of July. C. J. Cockburn, in a

carefully-considered opinion, decided that the jury was justified in finding for the defendant; that it was the intention alone to defeat the operation of the bankrupt law which constituted a fraudulent preference. A payment made in the absence of such a motive though its necessary consequence would be to prevent a rateable distribution of the bankrupt's effects, and thus defeat the law, is valid. Demand or pressure by the creditor rebuts ordinarily the presumption of a fraudulent intention to defeat the law, which would arise from a spontaneous payment unexplained; hence the emphasis which is laid upon such evidence. But any other evidence which satisfies the jury of the *bonâ fide* character of the payment is sufficient.

***McCANNON and Others v. SINCLAIR and Others. June 10. [*53**

Where a parish comes down as far as the bank of a river, there is a *prima facie* presumption that the parish extends as far as the middle of the river. A pier leading from the river's bank, in such a parish, into the river, beyond the low-water mark, and consisting of a fixed platform, supported on piles commencing within two or three inches from the bank, and a floating barge, moored close to, but not attached to, the platform, is to be held, in the absence of evidence to rebut the presumption, as being within the parish. And such pier is rateable to the poor-rate.

ON an action brought by plaintiffs against defendants for the recovery of certain rates claimed by plaintiffs to be due and payable to them by defendants under certain assessments for the relief of the poor of the parish of Rotherhithe, in the county of Surrey, a case was, by consent and by order of Crompton, J., stated for the opinion of the Court, which was substantially as follows:

The plaintiffs are the churchwardens and overseers of the said parish of Rotherhithe, and the defendants are the managers, on behalf of certain of the watermen of the river Thames who, with them, are the owners or proprietors, and for the purposes of this case may be regarded as the exclusive occupiers, of the Commercial Dock Pier hereinafter described.

The said pier projects into the river Thames, and commences at and from a distance of about two or three inches away from a certain embankment, wharf, wall, or landing-place, situate within the said parish; but whether the river front of the said embankment forms or is in fact the river boundary of such parish is unknown to either of the parties to the action, except in so far as the same may be inferable from or determined by the facts.

The plaintiffs, however, admit that, in beating the boundaries of the said parish, the parochial authorities do not for that purpose proceed on the river, but upon and along the embankments, wharves, walls, landing-places *or shore abutting thereon; whereas, in the [*54 adjoining parish of Bermondsey, the parochial authorities, in beating the boundaries of that parish, go along the middle of the river Thames. The plaintiffs also admit that they are not aware of the said parish of Rotherhithe having at any time done or exercised any parochial acts or authority beyond the said embankment. The average high-water mark rises within three feet of the top of the said embankment. The said embankment is the termination of a street and public thoroughfare leading from the said river into the township and parish of Rotherhithe aforesaid, and has been from time immemorial used by the Thames watermen as a landing-place and a place of embarkation for persons conveyed by them.

In 1854 the Corporation of London granted the said watermen permission to erect the present standing pier. The said pier is about 203 feet long, and consists partly of a fixed wooden framework, which extends to about twenty feet beyond low-water mark, and partly of a floating barge or dummy, which is placed against the extreme end of the said framework, beyond the low-water mark. The framework is supported upon wooden piles driven into the bed of the river, the first of the said piles being two or three inches from the embankment. The barge is moored by anchors and chains, but is not fastened to the framework. [The case then proceeded to describe in detail the

construction of the fixed framework and barge. This part of the case is omitted, as it does not affect the argument, or the decision of the Court.] The use of the pier necessarily embraces the whole length thereof, and payments made in respect of such use constitute all the profits which the defendants, for themselves and the said water-
 *55] men in connection *with them, derive from the occupation and user of the said pier.

The defendants refused to pay the said rates on the ground, among others, that the said pier was not liable to be rated, inasmuch as the same was not within the said parish.

The first question for the opinion of the Court was, Whether the defendants were liable to be rated in respect of their occupation of the said pier, or any part thereof.

The second question was merely as to the form of the rate, and was not raised before the Court.

Lush, for the plaintiffs.—The question is whether any part of the pier is within the parish. The plaintiffs contend that it is, inasmuch as the parish of Rotherhithe extends to the middle of the river. *Primâ facie*, the boundary of a county would be held to extend so far: and the same presumption exists as to a parish. [The Court then called upon the other side.]

J. Simon, for the defendants.—The onus of proving the area of rateability lies upon the party claiming to make the rate. [Lord CAMPBELL, C. J.—Is there not a presumption, under such circumstances as these, which it is for the party rated to rebut?] If there be such presumption, it is rebutted by the facts of the case. The parish authorities, in beating the boundaries, go no further than the embankment, contrary to the practice of the authorities of the adjoining parish, who proceed along the middle of the river. That raises the inference that the boundaries of the parish of Rotherhithe do not embrace as much of the river as the parish of Bermondsey does.
 *56] [Lord CAMPBELL, C. J.—It may be that the parish *authorities of Rotherhithe go as near to the boundaries as the land will permit, on the assumption that it is well known that the parish really extends to the middle of the river. If any inference be raised from the practice of the parish authorities of Bermondsey, it is an inference against the defendants.] But, further, there is no presumption, in the case of a parish, that it extends beyond the bank of the river on which it stands; though such presumption may exist as to the boundary of a county, or the ownership of land, abutting on a river. In *Regina v. Musson*, 8 E. & B. 900 (E. C. L. R. vol. 92), it was held that there is no *primâ facie* presumption that the portion of land on the seashore, between high and low water mark, forms part of a parish coming down to the seashore; and that in the absence of evidence that it does form part it must be taken that it does not. [Lord CAMPBELL, C. J.—There the parish abutted upon the sea.] There is no distinction between the sea and a navigable river, as regards the boundary of land abutting on either.

Lord CAMPBELL, C. J.—The point has very properly been argued: but we are all clearly of opinion that the plaintiffs are entitled to judgment.

Per CURIAM.(a)

Judgment for the plaintiffs.

(a) Lord Campbell, C. J., Wightman, Erle and Crompton, Js.

***WILLIAM WESTOVER, Appellant, v. CHARLES PERKINS, Respondent.** *June 11.* [*57]

A carriage and horses belonging to the Queen, driven by the Queen's coachman, and used by a member of the Queen's household, or his family with the Queen's permission, though not upon the Queen's service, are exempt from turnpike tolls.

THIS was a case stated under stat. 20 & 21 Vict. c. 43, and was substantially as follows:

At the Petty Sessions held at Weston, in the county of Somerset, on 13th January, 1859, an information was preferred by the appellant, one of Her Majesty's coachmen, against the respondent, keeper of the Bathampton turnpike gate, for that the respondent, on 27th December, 1858, in the parish of Bathampton, in the said county, did demand and take a certain toll for a carriage and horses which passed through the said turnpike gate, and which was exempt from the payment thereof, such exemption having been then and there claimed.

On the toll being demanded, the appellant produced the following ticket.

"The bearer, William Westover, one of the Queen's servants, in charge of Her Majesty's horses and carriage.

"Royal Mews, Pimlico,	(L. S.)	"J. R. GROVES,
"12th November, 1858."		"Crown Equerry."

The appellant deposed as follows. "I have been sixteen years acting as coachman to Her present Majesty. For two years successively, viz., 1856 and 1857, I went by road with the same horses and carriage I have now to Dover. My wife was at the time inside, alone. We remained at Dover three months each time. I was in the habit of taking out airing, during that time, Mrs. *Groves, who was in the carriage on 27th December. Mrs. Groves is the wife of [*58] Major Groves, Crown Equerry. I receive my money for my services from the paymaster of the household. During the six months I drove the carriage, Mrs. Groves was in it, and I passed through several turnpike gates during the six months, and it was only on one occasion I ever paid toll, and the money was afterwards refunded to me. I never received any remuneration from Major Groves. The Queen's coronet is on the carriage."

It was admitted by consent (after the case had been drawn up) that the carriage and horses were the property of Her Majesty, and that at the time toll was taken by the collector Mrs. Groves (the wife of Major Groves the Crown Equerry) was in the carriage. It was also further admitted that Major Groves was at the time in London, and that the carriage and horses were not on this occasion being used in the discharge of Major Groves's duty as Crown Equerry, but that Mrs. Groves was driving in the carriage for her own pleasure. It was also admitted that such user of the carriage and horses was by the permission of Her Majesty. It was also admitted that the said highway upon which the said toll was demanded was a highway within the operation of The General Turnpike Act, 3 G. 4, c. 126; and also that the respondent, subject to the points raised in the case, was lawfully entitled to demand and take the said toll by virtue of that Act and of the local Act regulating the said highway.

On the part of the respondent, it was admitted that Her Majesty's exemption extended to all persons, horses and carriages attending Her Majesty; but it was contended that the Queen could not extend *59] her prerogative so as to *exempt persons using her carriages at a distance, as in the present case, more particularly as the exemptions in stat. 3 G. 4, c. 126, s. 32, and 4 G. 4, c. 95, s. 24, extended only to horses and carriages attending Her Majesty or any of the Royal Family, or returning therefrom.

The justices dismissed the information. •

The question for the opinion of the Court was, Whether the Queen being quit of all tolls by prerogative, Her Majesty's carriage and horses were or were not, under the circumstances stated, entitled to pass toll free over the Bathampton turnpike road on the occasion referred to.

Sir *Fitzroy Kelly*, Attorney-General, for the appellant.—The decision of the justices was wrong. It is admitted, by the other side, that the Queen is free from toll by prerogative: and a carriage and horses belonging to the Queen, and used by another with her permission, are as free from toll as if they were being used by the Queen personally. The exemptions contained in stats. 3 G. 4, c. 126, and 4 G. 4, c. 95, which include, no doubt, an exemption of horses and carriages in attendance on the Queen, do not, it is admitted, apply to the case of a carriage and horses of the Queen, used by one of her household with her permission but not in attendance on her. But in *Com. Di. Toll* (G 1), it is said, "The King is quit of all tolls by his prerogative," citing *Corporation de Maydenhead*, Palm. 76, 85. In *Viner's Abridgment, Toll*, (D) 1, it is laid down that the King shall go toll free in all markets and fairs, for things bought, &c. In *Brooke's Abridgment, Prerogative*, pl. 112, and in other authorities, the same *60] position is laid down. It is on this prerogative *that the appellant relies, and not upon the exemptions in the statutes referred to. But one of those statutes, 3 G. 4, c. 126, furnishes an argument in favour of the appellant. By sect. 39, if any person subject to toll refuses to pay it after demand, the collector may distrain, among other things, the carriage and horses in respect of which such toll is imposed. If, therefore, the respondent's contention be correct, not only would great inconvenience arise by the distress of the Queen's carriages and horses, but a toll collector would be the person, obviously a most unfit one, to inquire, in such a case as the present, into the precise circumstances attending the use of the carriage. [He was then stopped by the Court.]

Watkin William, for the respondent.—The carriage and horses were liable to toll. Toll is a personal obligation, not necessarily imposed upon the owner, as such, of the goods in respect of which it is claimed; the goods being merely the measure of the liability, where the liability exists, of the person using them for the time. Where, therefore, the owner of the goods, when using them himself, is exempt from toll, it does not follow that another person using those goods is exempt. So, here, the prerogative of the Queen, the owner of the carriages and horses in question, to be exempt from toll, does not extend to Major Groves, whose wife was the person using the carriage at the time. Even if the prerogative extended so far as to

exempt the person using the goods from the toll from which the Sovereign is exempt when using them, the exemption of the former could arise only in cases where the Sovereign himself would be liable if he were not exempted by prerogative. Now, here, the Queen, independently of prerogative, would *not have been liable to [*61 pay toll; and therefore the carriage and horses were not protected by the royal prerogative. In *Les Termes de la Ley*, p. 526, toll is described as follows: "Tol or Tolne, is most properly a payment used in cities, towns, markets, and fairs, for goods and cattel brought thither to be bought and sold: and is always to be paid by the buyer, and not by the seller, except there be some custom otherwise. There are divers other tols; as turn tol, which is where tol is paid for beasts that are driven to be sold, although they be not sold indeed. Tol travers is, where one claims to have a halfpenny, or such like tol, of every beast driven over his ground. Through toll is, where a town prescribes to have certain toll for every beast that goes through their town." In Sheppard's *Abridgment*, title *Toll*, the following general definition is given: "Toll, in a general sense, doth signifie any manner of custom, subsidy, prestation, imposition, or sum of money, demanded for carrying out, or bringing in of wares to be taken of the buyer. And is sometimes used for a liberty to buy and sell within the precincts of a manor. And so it seems to be but as a fair or market. Sometimes it is used for a tribute, or custom, to pay a little sum of money for a conveniency of passage, or some other thing. As where it is claimed for the setting up of stalls in fairs or markets, which is called stallage: or for the digging up of the ground there for that purpose, which is called pickage: or for drawing up of vessels out of a ship into a wharf, which is called cranage: or for going over such a place on foot, which is called pedage: or for passing over a ferry, with man or beast, which is called a passage: or for passing over a bridge, which is called pontage: or for the paving of a city, or causway, which is called pavage: or for the making of a wall in time of war *for defence of the nation, which is called murage: or for the weighing of wool, [*62 which is called tronage: or for passage with wares, which is called passage. But this word is most commonly and properly taken for a payment used in cities, towns, markets, and fairs, for goods and cattle brought thither to be bought and sold." Similar definitions are given in Fitzherbert's *Abridgment*, title *Toll*, Brooke's *Abridgment*, title *Tolle*, Com. Di. *Toll* (A), and Vin. Ab. *Toll* (A), note. And, undoubtedly, the language of the authorities, in speaking of the Sovereign's prerogative to be free from toll, would seem at first in favour of the contention that the prerogative attaches to the goods. In Fitzherbert's *Abridgment*, title *Toll*, pl. 5, a case is given from Yearb. 23 H. 3, the original report of which does not exist, but which is thus cited by Fitzherbert. "Nota que le Roy aler toll free en tous markets et faires pur chose achate, &c.: car le Roy ne fera prejudice par son graunt dascun libertie que perteign a sa person, &c.: mes quere de toll travers, sil paiera ceo, et semble que cy." And it is to this case that Brooke, in his *Abridgment*, *Prerogative*, pl. 112, and other authorities, refer in support of the prerogative. But it is clear, from the various kinds of toll enumerated in Sheppard's *Abridgment*,

that it would not always be the owner of the goods who would be liable *primâ facie* to the toll, and that therefore his exemption from toll would not attach to the goods so as to exempt another person using them. That the liability to toll is personal is shown by the fact that an action of *assumpsit* lies for tolls. [HILL, J.—For turnpike tolls?] For all tolls. In *Seward v. Baker*, 1 T. R. 616, it was held that a general *indebitatus assumpsit* lies for tolls. Buller, J., *63] in giving his judgment, says, "The objections" "are all resolvable into one, which is the real question, whether a general *indebitatus assumpsit* will lie for tolls? And on that point the cases are all one way." [Lord CAMPBELL, C. J.—But is there any decision that *indebitatus assumpsit* lies for *turnpike* tolls? They are in the nature of a tax.] So are all tolls. There is no direct authority that turnpike tolls can be sued for. But there is no reason why they should not, if other tolls can be so recovered. *Peacock v. Harris*, 10 East 104, was an action for turnpike tolls, although the question there was principally whether there was evidence of an account stated between the plaintiff, who was the collector, and the defendant. Moreover, the power of distress given to the toll collector, under stat. 3 G. 4, c. 126, s. 39, shows that the liability to turnpike tolls is a personal one. [HILL, J.—How do you answer the objection that, if the respondent's contention be correct, the Queen's carriage and horses might be distrained?] The answer is that, where the carriage and horses are the Queen's, the collector is deprived of his remedy by distress, but his right of action would still remain. [ERLE, J.—Where would you draw the line as to the liability of the Queen's carriage to toll?] The real test is, in whose actual service and use is the equipage at the time? Here the carriage was clearly not engaged in the service of the Queen. The question whether the Royal prerogative attached to carriages and horses of the Sovereign, so as to exempt them from toll, in whatever hands they might be at the time, was evidently a matter of doubt as far back as the time of the Mutiny Act, 49 G. 3, c. 12; sect. 62 of which recites that, "in consequence *64] of certain exemptions from toll, expressly allowed by several Acts of Parliament for His Majesty's forces on their march, or on duty, and for the horses and carriages attending them, doubts have arisen whether in all cases not so exempted, the officers and soldiers, and the carriages and horses belonging to His Majesty or employed in his service, and returning therefrom, may not be charged with the payment of toll;" and then proceeds to declare the horses and carriages, so employed, exempt. This shows that the Legislature considered it necessary to create the exemption by statute, and therefore raises a strong inference that they did not consider it to exist by prerogative. A similar argument in favour of the respondent is furnished by the decisions which establish that Crown property and premises, *primâ facie* exempt from poor-rate, are rateable to it if in the occupation of a subject: *Lord Bute v. Grindall*, 1 T. R. 338, *Regina v. Ponsonby*, 3 Q. B. 14. The general rule, therefore, is, that the prerogative of the Sovereign does not extend to anything not in the Sovereign's use at the time.

Sir Fitzroy Kelly, Attorney-General, was not called upon to reply.

Lord CAMPBELL, C. J.—*Mr. Williams* has argued this case with

much ability: but he has failed to convince me that the respondent's contention is correct, and that the carriage and horses were liable to toll. As the case originally stood, there was some difficulty; for there was nothing to show that the carriage was being used with the permission of the Queen. But it has since been admitted that it was so used. The carriage and horses were the Queen's; her coachman was driving: and the *occupant of the carriage was using it by her permission. It was contended that the carriage and horses were free from toll only when in the service of the Queen, either for her own use, or for that of her family or guests. But I cannot see the distinction, as regards the liability to toll, between the present case and the case of a guest of her Majesty—the Emperor of Russia, for example—staying at Windsor, and being permitted to drive out in one in the Queen's carriages as her guest. In such a case no toll could be claimed; and I think it could not be claimed in the present case. From time immemorial the Sovereign has been exempt from toll; and when tolls are imposed by statute there is an implied exemption of the Sovereign's property, either in her own personal use, or in that of her household, as I think the carriage and horses were here. [*65]

WIGHTMAN, J., was absent.

EBLE, J.—I also am of opinion that the exemption of the Sovereign from toll extends to this case. It is conceded that the exemption extends to carriages and horses of the Queen in the use of her guests, or of members of her household, as such; and I do not see how we can draw the line, and say that the exemption extends so far, but not to the use of a carriage and horses by a member of the Queen's household, for his own purposes but by permission of the Queen.

HILL, J.—I think that, upon the facts stated in this case, the prerogative applies.

Judgment for the appellant.

*HERNE, Appellant, v. GARTON and STONE, Respondents. [*66]

Sect. 168 of The Great Western Railway Act, 5 & 6 W. 4, c. cvii., enacts that every person who shall send or cause to be sent by the said railway any vitriol, &c., or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the Company with whom the same are left, at the time of sending, on pain of forfeiting 10*l.* for every default, or being imprisoned.

Held, that the Act made the sending of dangerous goods, without notice, a criminal offence: and that therefore a guilty knowledge on the part of the sender was necessary to render him liable under the Act.

Respondents received from N. some cases containing vitriol, and sent them by the railway. The nature of the goods was not marked on the packages or known to respondents when they received the packages. N., in answer to an inquiry by respondents, informed them that the cases contained gun-stocks and other goods of a harmless nature: and respondents so described them in the receiving note sent by them with the goods to the railway, in which note they described themselves as the consignors.

Held that, as respondents had been misled by N. as to the nature of the goods, and had no guilty knowledge of their dangerous character, they were not liable as senders of the goods, within the meaning of the Act: although, *semble*, they would have been civilly liable to the Company for any damage arising from the sending.

Semble also, that N. would have been liable, under the Act, as the person causing the goods to be sent.

THIS was a case stated by justices, under stat. 20 & 21 Vict. c. 43 and was substantially as follows.

The appellant laid an information, before one of the justices for the city and county of Bristol, against the respondents, for that they did, on 24th March, 1859, at the Great Western Railway Station, in the parish of Temple, otherwise Holy Cross, in the city and county of Bristol aforesaid, send by the Great Western Railway certain goods, to wit, six carboys of oil of vitriol, being goods of a dangerous quality, and did not distinctly mark or state the nature of such goods on the outside of the packages containing the same, and did not give notice in writing to the book-keeper or other servant of the said Company with whom the same were left at the time of so sending the said goods, contrary to stat. 5 & 6 W. 4, c. cvii.,(a) which imposes a forfeiture of 10*l.* for the said offence.

*67] *The proceedings in this case were taken under sect. 168 of the said Act, which enacts as follows. "And for the better preventing of accidents or injury which might arise on the said railway and works from the unsafe and improper carriage of certain goods and merchandise upon the same, be it further enacted, that every person who shall send or cause to be sent by the said railway any aquafortis, oil of vitriol, gunpowder, or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package containing the same, or shall otherwise give notice in writing to the book-keeper or other servant of the said Company with whom the same shall be left, at the time of so sending or causing the said goods to be sent, on pain of forfeiting for every default herein the sum of ten pounds: Provided always that the said Company shall not be compelled or compellable to carry upon the said railway any gunpowder or other goods which in the judgment of the said Company shall be of a dangerous character: and it shall be lawful also for the said Company to restrain any other persons from carrying thereon gunpowder or such other goods as aforesaid." By section 206 it is enacted that such penalty shall be recovered in a summary manner before two justices.(b)

The appellant is a servant in the employ of The Great Western Railway Company, and the respondents carry on business at Bristol as common carriers, under the firm of Garton & Stone. On 24th March, 1859, a haulier of the respondents was directed by the respondents to convey four wooden cases from the house of Mr. John *68] *Martin Nicholas to the office of the respondents at Bristol. Each case was marked and directed as follows, and they were respectively numbered 1, 2, 3, 4.

"Mr. E. O. NICHOLAS, Merchant, Auckland,
"Per British Queen, "New Zealand."
"Katharine Dock. This side up."

(a) Local and personal, public. "For making" "the Great Western Railway."

(b) Recoverable by distress-warrant, with power to the justices, if there be no sufficient distress, to imprison for not more than three months. This part of the section was not set out in the case: but is referred to in the judgment of the Court.

The haulier received the cases from Mr. Nicholas, and conveyed them to the respondents' office, whither Mr. Nicholas followed them, and saw both the respondents in the office. The cases were then weighed, and Mr. Nicholas said he thought they did not weigh so heavy. The respondent Stone said he would weigh them again. He did so, and asked Mr. Nicholas what was in the cases to make them weigh so heavy. Mr. Nicholas replied, "Some stocks, seeds, and a few corks."

The respondent Stone then filled up a printed form of receiving note, and gave it to the respondent, Garton, who thereupon proceeded to the goods department of The Great Western Railway Company, conveying with him, in a cart belonging to the respondents, the said four cases, and accompanied by Mr. Nicholas.

The following is a copy of the receiving note.

"To The Great Western Railway Company.
Bristol Station, March 24, 1859.

"Receive the undermentioned goods, to be sent to Paddington Station, and delivered to Garton & Stone, consignees, or their agent, Ford & Co.

Name or Mark.	No.	Article.	Contents.	Weight.			Remarks.
				Tons	cwt.	qrs. lbs.	
Nicholas.	4	Cases.	Gun Stocks.	16	0	10	1 2 0 4 0 18 Alld.

"Garton & Stone, Consignors." "J. F. 273."

*It is generally the practice of the Company to require the delivery of a receiving note from parties bringing goods for conveyance by the railway, and they usually provide printed forms of such notes, to be filled up as the case may require. The respondents, with the acquiescence of the Company (so far as user and acceptance implies acquiescence), have adopted for themselves and provided a receiving note in the form above specified, and they use it in their transactions with the Company. When the respondent Garton arrived with the cases at the railway station, he delivered the said note, in the presence of Mr. Nicholas, to a porter in the employ of the Company, and requested that the cases might be weighed. This was accordingly done, and a slight variation was found to exist between the actual weight of the cases and the weight stated on the receiving note. It does not distinctly appear whether or not Mr. Nicholas read the said note. He saw it in the hand of the respondent Garton, and checked the weight stated on it with the actual weight of the cases as ascertained by the porter when he weighed them. A witness who was examined on this point said, "Mr. Nicholas saw the note delivered at the station." On being cross-examined, he added, "Mr. Garton took down the note. Mr. Nicholas could not be off seeing it, for he was close by at the time, and checked the weight on the note." And in answer to a further question, "Do you mean to say Nicholas read that note?" the witness replied, "He could not be off seeing it." The justices inferred from this evidence that Mr.

Nicholas had read and was cognisant of the contents of the receiving note.

It did not appear that the respondents had any knowledge of the contents of the cases, except from the *communication of Mr. #70] Nicholas to the respondent Stone that they contained stocks, seeds, and a few corks: and nothing external was visible on the cases to indicate, either to the servants of the railway Company or to the respondents, or from which there could have been any suspicion, that the contents were not correctly described as gun-stocks. After the cases had been weighed, they were left by the respondents in the possession of the servants of the railway Company for transmission to Paddington, whither they were accordingly conveyed on the Great Western Railway, in a truck or carriage belonging to the Company, according to the terms of the receiving note, which was also duly forwarded to Paddington, where the sum of 1l. 2s., less an allowance of 4s., was entered on it by a servant of the Company as the amount of charge payable to the Company for the conveyance of such cases to Paddington, on the assumption that they contained gun-stocks. On the arrival of the cases at Paddington, they were placed in due course with other goods in the warehouse of the Company, where they remained until the following morning; when a servant of Ford & Co., the agents of the respondents, applied for them. Two of the cases had been placed in a cart for delivery accordingly, and a third was being so placed, when an officer of the Company saw smoke issuing from it. He opened it, and found that it contained two carboys of oil of vitriol, of which one had been broken, and had burnt the straw in which the carboy had been packed. Two others of the said cases were also found to contain each two carboys of oil of vitriol in an unbroken state, and the fourth case contained Japan wares and some corks, but there were no gun-stocks in either case. If the case which contained Japan wares had been so entered on the receiving #71] note it would have been liable to *a higher rate of charge than was payable for gun-stocks; and if the cases which contained oil of vitriol had been so described on the receiving note, the Company might have demanded for them a still higher rate of charge, or might have refused to convey them on the railway. It did not, however, appear to the justices that the respondents would have derived any personal benefit from the fraud. On the contrary, they were of opinion that the profit would have accrued to Mr. Nicholas, and not to the respondents, who believed that the goods were gun-stocks. There was no mark on the outside of either of the cases which enclosed the carboys to denote that the goods therein were dangerous; nor was any statement or notice in writing or of any kind whatever given to any book-keeper or other servant of the Company by the respondents, or any other person, previous to the sending and conveyance of the said goods from Bristol to Paddington, other than and except the statement or notice mentioned or specified in the receiving note, and which described the contents of the cases as gun-stocks. When the dangerous nature of the contents of the cases had been ascertained at Paddington, the servant of the Company refused to deliver them to the servant of the respondents' agents, and notice thereof was given to the respondents' agents by their said servant on

the same day. A day or two after the respondents had been apprised of such fact, they informed the Company, by the before-mentioned servant, that they, the respondents, were ignorant of the contents of the cases: that John Martin Nicholas was the sender thereof; and they furnished the Company with his address. It also appeared that Mr. Nicholas, after it had been discovered that the cases contained oil of vitriol, stated to the Company that he had given the same to the respondents to forward for *him, and he also acknowledged that [*72 he had not informed the respondents that the cases contained oil of vitriol: but the Company refused to recognise Mr. Nicholas, or to deal with him as the sender, or the person who caused the said cases to be sent by the railway. The porter who received the cases at Bristol was personally acquainted with the respondent Garton, and knew that he carried on business as a carrier with the other respondent Stone; but he was not acquainted with Mr. Nicholas, and the justices were of opinion that the said porter had no reason to suspect, nor did he know, that Mr. Nicholas was the owner, or the sender or person who caused the said cases to be sent, nor did he recognise any person except the respondents in the transaction. He knew that the receiving note, so far as it was not printed, was in the same handwriting as that of the notes usually delivered to him by the respondents; that the cart which conveyed the cases to the railway belonged to the respondents; and that the haulier was their servant.

The justices were of opinion, upon the foregoing state of facts, that the respondents did not send the said goods within the meaning of the 168th section of the Act; but that they acted as consignors for Mr. Nicholas, against whom the Company should have proceeded, as the person who caused the said goods to be sent. They were also of opinion that, to establish an offence within the meaning of the said 168th section, it was necessary that there should be a guilty knowledge. That in this case there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. The justices therefore determined that the respondents were not guilty: whereupon the appellant, being dissatisfied *with the determination as being erroneous in point of law, applied for a case for the opinion of the Court of [*73 Queen's Bench.

Montague Smith, for the appellant.—The respondents, who are described in the written contract as the consignors, are the persons who “send or cause to be sent” these goods by the railway, and are therefore liable to the penalty. [CROMPTON, J.—Must there not be a guilty knowledge? This is not the subject of a *qui tam* action: it is a criminal offence. Lord CAMPBELL, C. J.—And it is punishable by imprisonment.] It is not necessary, in order to render the respondents liable, that they should have sent these dangerous goods wilfully: the statute says nothing as to the intention or knowledge of the persons sending. In *Rex v. Marsh*, 2 B. & C. 717 (E. C. L. R. vol. 9), it was held that, in an information under stat. 5 Ann. c. 14, s. 2, charging a carrier with having game in his possession as carrier, it was not necessary to aver that he had it knowingly. The respondents, by sending the goods, undertook all responsibility as to the

nature of them. [WIGHTMAN, J.—Would Nicholas be liable?] That is a somewhat nice question. But the respondents, at all events, are liable, as the actual senders of the goods, to whom the statute applies in express terms.

Huddleston, contra, was not called upon.

Lord CAMPBELL, C. J.—I am clearly of opinion that the justices were right in refusing to convict the respondents. They say “we were of opinion” that the “respondents did not send the said goods within *74] the meaning of *the 168th section of the Act; but that they acted as consignors for Mr. Nicholas, against whom the Company should have proceeded, as the person who caused the said goods to be sent.” I do not give any opinion whether or not the Company might so have proceeded. But the justices go on to say, “we were also of opinion that, to establish an offence within the meaning of the said 168th section, it was necessary that there should be a guilty knowledge: that in this case there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact.” As to this latter reason I think the justices were perfectly right: *actus non facit reum nisi mens sit rea*. The act with which the respondents were charged is an offence created by statute, and for which the person committing it is liable to a penalty or to imprisonment. Not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised upon them by Nicholas, in describing the goods falsely, just as much as if, after harmless goods had been delivered by him for consignment, perilous goods had been substituted by him in their place, without the knowledge of the respondents. There was neither negligence nor moral guilt of any kind on their parts: and are they to be made the victims of Nicholas’s fraud? I am inclined to think that they are civilly liable to the Company, as being the persons who actually sent the goods by the railway: but I am clearly of opinion that they are not criminally liable under this Act: and that Nicholas was the person against whom these proceedings should have been taken.

*75] *WIGHTMAN, J.—I think that the respondents may be civilly liable to the Company: but I am of opinion that they are not liable to a conviction under this Act. It is true that they acted nominally as the consignors of the goods: but I think that the justices were right in holding that the respondents were not the senders within the meaning of the Act, so as to render them criminally liable for the dangerous character of the goods, in the absence of any guilty knowledge of that dangerous character. Not only is there no proof of such guilty knowledge on their part, but it appears, further, that they were imposed upon, and misinformed as to the nature of the goods by a person who did know their real nature. I think that the conclusion at which the justices arrived was perfectly correct.

ERLE, J.—I am of opinion that one of the reasons given by the justices for their decision was wrong, namely, their finding that the respondents “acted as consignors for Mr. Nicholas,” “the person who caused the goods to be sent.” I think it is clear from the facts of the

case, and from the written contract, that the respondents were the consignors of the goods: but I think they were not senders within the meaning of the Act, so as to render them liable to a conviction. They would have been liable, if the Act had merely provided that where dangerous goods were sent without notice the sender should be liable to pay the Company 10%. But the Act makes such sending an offence also punishable by imprisonment. I was inclined to think, at first, that the provision was merely protective: but, if it create a criminal offence, which I am not prepared to deny, then the mere sending by the respondents, without a guilty *knowledge on [76 their part, would not render them criminally liable: although, as they took Nicholas's word for the contents of the parcels, and sent them by the railway, they would be civilly liable to the Company for any mischief arising from that sending.

CROMPTON, J.—I think the justices were right in deciding that the respondents were not the senders of the goods, within the meaning of the enactment, so as to render them liable to a penalty or to imprisonment; though I think they were the senders so far as to render them civilly liable to the Company for any damage arising from the sending. I do not think that the act is merely for the protection of the railway: it is also for the protection of the public; and it makes the sending a crime, not merely in form, but in reality, by affixing a punishment to it. Now it is a rule of criminal law that a person cannot be criminally liable for acting as the agent of another without any knowledge that he was acting wrongly. Applying that rule to the construction of this statute, we must hold that it intended to make the senders of dangerous goods for another without notice liable only where they sent them knowingly. It was Nicholas who sent these goods knowingly, not the respondents, who were imposed upon by his misrepresentation. I think that Nicholas would probably be liable under the Act, although it is not necessary to decide that point: but I am clearly of opinion that the respondents, though civilly liable, are not liable criminally: and that the justices were right in refusing to convict.

Judgment for the respondents.

*The QUEEN v. EDMUNDSON. June 11. [77

Sect. 10 of stat. 17 G. 3, c. 56, enacts that it shall be lawful for any two justices, upon complaint made to them upon oath that there is cause to suspect that purloined or embezzled materials, used in certain manufactures, are concealed "in any dwelling-house, out-house, yard, garden, or other place or places," to issue a search-warrant for the search, in the day time, of every such dwelling-house, &c.: and if any such materials, suspected to be purloined or embezzled, are found therein, to cause the same, and the person "in whose house, out-house, yard, garden, or other place" they are found, to be brought before two justices: and if the said person shall not give an account to their satisfaction of how he came by the same, he shall be adjudged guilty of a misdemeanour.

Held, that a warehouse, occupied for business purposes only, and not within the curtilage of or connected with any dwelling-house, was a "place" within the meaning of the section.

WELSBY, in this Term, obtained a rule calling on the prosecutors to show cause why a conviction of John Edmundson, dated 4th March,

1859, whereby the said John Edmundson was deemed and adjudged to be guilty of a misdemeanour, and adjudged to forfeit and pay the sum of 20*l.* as therein mentioned, and also an order of Sessions made by the Recorder of Manchester in confirmation thereof, should not be severally quashed.

The conviction stated that, on 4th March, 1859, at the city of Manchester, the said J. Edmundson was convicted before Daniel Maude, Esq., the stipendiary magistrate for the said city, for that, on 28th January, 1859, the said J. Edmundson unlawfully had in his possession and on his premises, to wit, in a house and place of the said J. Edmundson, to wit, a warehouse situate and being within the city aforesaid, certain materials used in the woollen, linen, cotton, mohair, and silk manufactures respectively, then and there respectively suspected to be purloined and embezzled respectively, to wit, &c. [setting out the materials]. That the said J. Edmundson had, on being first brought up upon the said charge, applied for and obtained two adjournments of the hearing of the charge aforesaid until the said 4th March, 1859; but did not at any time produce before the said *78] stipendiary magistrate the party or parties, or any person or persons who was or were, in the opinion of the said magistrate, duly entitled to dispose of the same materials, of whom he, the said J. Edmundson, bought or received the same; nor did he, on any of the said days, or at any time, give an account, to the satisfaction of the said magistrate, how he came by the said materials, nor that the same were honestly come by; contrary to the statutes in that case made and provided: whereupon the said magistrate adjudged him, the said J. Edmundson, to be guilty of a misdemeanour, and adjudged him, for his said offence, to forfeit and pay the sum of 20*l.*

The conviction was appealed against, and, on 4th April, 1859, was confirmed by the Recorder of Manchester, with costs.

The affidavit of Edmundson, upon which, with others, the rule was obtained, stated, among other matters, that the warehouse in which the said materials were found consisted of two rooms in certain premises and buildings which he occupied as a warehouse, and for business purposes only; and the remaining rooms of the same building had been and were used and occupied for warehouse and business purposes only by other persons named in the affidavit. That no person slept upon or resided upon the said buildings or premises. That the said warehouse was situate in that portion of the city used for business purposes only, and that there are a large number of warehouses erected, used, and occupied adjoining and contiguous thereto. That Edmundson, and the whole of the said parties occupying the said buildings aforesaid, lived away from the said place of business respectively, and that Edmundson himself resided upwards of a mile and a half therefrom.

*79] The affidavit of one of the clerks to the solicitor of J. Edmundson stated that, at the hearing before the magistrate, and also at the hearing of the appeal against the said conviction, it was admitted on behalf of the prosecutor, that the said warehouse was unconnected with and apart from, and was not within the curtilage of any dwelling-house.

Edward James and Leresche now showed cause.—The question turns

upon the construction of stat. 17 G. 8, c. 56,(a) s. 10, which is as follows: "And whereas it frequently happens that materials used in the manufactures before mentioned, are found, or known to be concealed in the possession of persons who have received the same, knowing them to be purloined or embezzled, or of persons known not to be entitled to dispose of the same: and whereas the discovery and conviction of the purloiners and embezzlers, buyers and receivers, of such materials, is full of difficulty, from the close and clandestine manner in which the offence is committed; and there is still greater difficulty in proving whose property such materials are; and it would tend to the discouragement and suppression of such offences, if the discovery and conviction of such offenders were rendered more easy: and whereas, by" stat. 22 G. 2, c. 27, "justices of the peace, after conviction of any offender for purloining or embezzling the said materials, or for buying or receiving the same, are authorized to grant *warrants for searching the houses and other places of the persons so convicted, but no such authority is given before conviction, nor in any other house or place, except such as belongs to a person convicted; be it therefore further enacted, that it shall and may be lawful for any two justices of the peace of any county, riding, division, city, liberty, town, or place, upon complaint made to them, upon oath, by any one credible person, or (being of the people called Quakers) upon solemn affirmation, that there is reason to suspect that any such purloined or embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling-house, outhouse, yard, garden, or other place or places, by virtue of a warrant under their hands and seals, to cause every such dwelling-house, outhouse, yard, garden, or place, to be searched in the day time: and if any such materials, suspected to be purloined or embezzled, shall be found therein, to cause the same, and the person or persons in whose house, outhouse, yard, garden, or other place, the same shall be found, to be brought before any two justices of the peace for the same county, riding, division, city, liberty, town, or place; and if the said person or persons shall not give an account, to the satisfaction of such justices, how he, she, or they came by the same, then the said person or persons so offending, shall be deemed and adjudged guilty of a misdemeanour, and shall be punished in manner hereinafter mentioned, although no proof shall be given to whom such materials belong." The question is, whether a warehouse such as that occupied by the defendant is a place which may be searched under the section, and the owner of which, if materials suspected to be purloined are found there, is bound to show how he came by them. A warehouse is *certainly either a "house" or "outhouse;" and the fact of this warehouse not being within the curtilage of a dwelling-house, [*81 does not make it the less a house or an outhouse, or, looking at the mischief which the statute was intended to remedy, take it out of the operation of the section. A warehouse of this kind affords peculiar facilities for the reception of these materials, if purloined; while, at

¹ (a) "For amending and rendering more effectual the several laws now in being, for the more effectual preventing of frauds and abuses by persons employed in the manufacture of hats, and in the woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, and silk manufactures; and also for making provisions to prevent fraud by journeymen dyers."

the same time, the owner of the building would have peculiar facility in accounting for the materials being there, if they were lawfully come by. But, at all events, a warehouse clearly comes within the term "other place or places." It does so, even if these words are to be construed as meaning "other place or places" ejusdem generis with the particular places previously named. But the words must be construed by looking at the object of the Act; and so construed, it is clear that they mean other "place or places" in which these materials, if purloined, are likely to be placed. This rule of interpretation was followed in *Rex v. Arnold*, 8 St. Tr. 290, 313; *East P. C.* 412. Stat. 9 G. 1, c. 22 (The "Black Act"), recites that "several ill-designing and disorderly persons have of late associated themselves," "and have," "armed with swords, firearms, and other offensive weapons, several of them with their faces blacked, or in disguised habits," "unlawfully hunted," &c., and then enacts "that if any person or persons," "being armed with swords, firearms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised," shall unlawfully hunt, &c., "or shall wilfully and maliciously shoot at any person in any dwelling-house, or other place," every person so offending shall be guilty of felony. It was held, in *Rex v. Arnold*, that, under this *Act, a person might be convicted for *82] shooting at another, although the person shooting had not his face blacked, nor was otherwise disguised at the time. So in *Rossel, qui tam, &c., v. Kitchen*, 1 Burr. 497, an action had been brought upon stat. 1 Jac. 1, c. 22, "concerning tanners, curriers, shoemakers, and other artificers occupying the cutting of leather," against the defendant, who was a butcher, for an offence under the Act; and it was objected that he did not come within the class of persons with a view to whom the Act was framed. But it was held that, as the object of the Act was, generally, to secure the proper manufacture of leather, the Act must be considered to extend to any persons committing an offence prohibited by it, and not merely to the class of persons enumerated in the title. So, in *Lowther v. The Earl of Radnor*, 8 East 113, it was held that stat. 20 G. 2, c. 19, which gives a magistrate jurisdiction to determine differences respecting wages between masters and servants in husbandry, artificers, handicraftsmen, &c., "and other labourers employed for any certain time, or in any other manner," extended to labourers of all descriptions, and not merely to labourers in the particular employments previously enumerated. [The Court then called on the other side.]

We'sby and Fernley, contra.—A warehouse such as this does not come within the definition of any of the particular places specified in the Act. And, to bring it within the meaning of "other place or places," (which would, no doubt, render the conviction right), it must be a place ejusdem generis with those previously specified; that is, a place belonging to or connected with a dwelling-house, which this warehouse is not. In *Rex v. The Manchester and Salford Water-works Company*, 1 B. & C. 630 (E. C. L. R. vol. 8), *was held *83] that pipes, works, and other apparatus of a water Company were not a "tenement" rateable under an Act which imposed rates upon the occupiers of all messuages, houses, warehouses, shops, cellars, &c., "and other tenements." So, in *Sandiman v. Breach*, 7 B. & C. 96,

(E. C. L. R. vol. 14), it was held that stat. 29 Car. 2, c. 7, s. 1, which prohibits any "tradesmen, artificer, workman, labourer, or other person whatsoever," from pursuing his ordinary calling upon the Lord's day, did not include, in the words "or other person whatsoever," the owner and driver of a stage coach, but applied only to persons ejusdem generis with those previously specified. In *re Boothroyd*, 15 M. & W. 1,† *Regina v. Wilcock*, 7 Q. B. 317 (E. C. L. R. vol. 53), and *Davis v. Nest*, 6 C. & P. 167 (E. C. L. R. vol. 25), were cases of convictions under this Act; but in all of them the materials were found in a dwelling-house; and there is no case of any conviction for the possession of such materials in a warehouse.

LORD CAMPBELL, C. J.—We have here to consider whether the magistrates were acting within their jurisdiction. Mr. *Welsby* has very properly admitted that if a warehouse is included within the "other place or places" described in sect. 10 of stat. 17 G. 3, c. 56, the conviction was right. I have no doubt that a warehouse is so included. The general principle laid down in all the cases which have been cited is that, where particular words are followed by general words, the latter must be construed as ejusdem generis with the former. I think that a warehouse is clearly a "place" ejusdem generis with the particular places, "dwelling-house, outhouse," &c., set out previously in the section. It would certainly be so if it were within *the curtilage of a dwelling-house: and I do not think [*84 that the fact of its being a small distance outside the curtilage would take it out of the enactment. Sect. 10 provides, generally, that the receivers of stolen property—not merely persons employed by the owners, but any persons having stolen goods of this kind in their possession—are liable to have their premises searched, and, if any property suspected to be stolen is found there, must prove to the satisfaction of the justices how it was come by. It was in the power of the Legislature, though it is a power which it would be necessary to exercise sparingly, and only where it was clearly for the benefit of the public, to throw, as has been thrown under this Act, the burthen of proving innocent possession upon the parties on whose premises the materials are found. I have no doubt that warehouses are within the mischief of the statute, as being places peculiarly adapted for the unlawful reception of these materials; and, as I have already said, they are ejusdem generis with the particular places previously named in the Act. I am therefore of opinion that the justices acted within their jurisdiction, and that the conviction was right.

WIGHTMAN, J.—I have not been in Court during the whole of the argument: but, as far as I am able to form an opinion, I think that section 10 was intended to include warehouses, and that the conviction was right.

ERLE, J.—I also am of opinion that the conviction was right. Sect. 10 enacts that search may be made for these materials, where there is reason to suspect that they have been purloined, in "any dwelling-house, outhouse, yard, garden, or other place or places;" and *the owner of the place where they are found, is to be bound to show how he came by them. The only point here is whether a [*85 warehouse is to be held as one of those "other" "places." In deciding that we must construe the statute with reference to the

object of the Legislature in passing it, and the evil which it was intended to remedy. Sect. 10 recites that the discovery and conviction of persons in possession of purloined and embezzled materials of this nature is very difficult, and that there is still greater difficulty in proving the ownership of the property: and in order, as is recited, to render a conviction more easy, it imposes upon persons in whose possession the materials suspected to have been purloined are found the duty of accounting for the way in which they were come by. It being supposed that materials of this kind might be easily carried away from the manufacturers and handed over to dishonest persons, it seems to me that a warehouse, being a place affording peculiar facility for the reception of these stolen materials, and, at the same time, a place the owner of which would have peculiar facility in accounting for his possession of the goods, is just one of those "places" which the Legislature intended to include in sect. 10. The language of the section is, no doubt, extensive: but looking, as I have said, to the mischief against which the Act was intended to guard, I have no doubt that a warehouse is within the Act.

CROMPTON, J.—I did not hear much of the argument in this case: but I heard the motion for a rule nisi, and thought then, as I think now, that there was not much in the point raised by the defendant. I am of opinion that the conviction was right.

Rule discharged.

*86]

*The QUEEN v. OWENS. June 11.

The mayor of a borough not divided into wards, who, with the two assessors, presides at and declares the result of an election of town councillors for the borough, under stat. 5 & 6 W. 4, c. 76, ss. 32–35, is precluded from being a candidate for election as town councillor; inasmuch as, acting as returning officer, he cannot return himself. Under sect 28, which enacts that no person shall be eligible as councillor "during such time as he shall hold any office or place of profit, other than that of mayor," in the disposal of the council of the borough, the mayor is eligible as town councillor, if the borough is divided into wards, for a ward in which he is not acting as returning officer.

Where the mayor is one of the councillors who go out of office on the 1st November, he causes a vacancy in the number of councillors, though, as mayor, he continues a member of the council till the 9th November.

THIS was an information, in the nature of a quo warranto, at the relation of Osman Pountney, calling on defendant to show by what authority he claimed to have, use, and enjoy the office, liberties, privileges, and franchises of councillor of the borough of Bewdley.

Plea that on 1st November, 1858, at the borough aforesaid. one third part of the whole number of councillors assigned to and elected in the said borough, to wit four of the said councillors who had then been for the longest time in office without re-election, went out of office, and that defendant was one of the said four councillors who so went out of office, in so far as he lawfully could or might. That afterwards, to wit on the same day and year last aforesaid, in the borough aforesaid, an election of four councillors to supply the place of those who so went out of office as aforesaid was held before defendant, he then and there being the mayor of the said borough duly elected, and entitled to hold and exercise the said office of mayor until

the 9th day of November in the year aforesaid, and until his successor should have been duly elected, and before John Parsons and William Cooke, who then and there were two assessors of the said borough. That defendant, *being then and there on the burgess-list, and [*87 also on the burgess-roll of the burgesses of the said borough, did then and there, at the request of several of the burgesses of the said borough, consent to allow himself to be re-elected and re-chosen a councillor of the said borough in the place of one of those who had then so gone out of office as aforesaid, and that, at the said election so held before him the defendant, so being the mayor of the said borough, and before the said two assessors as aforesaid, the burgesses of the said borough entitled to vote at the said election did openly assemble, and did then and there, according to the provisions of stat. 5 & 6 W. 4, c. 76, re-elect and re-choose defendant to be a councillor of the said borough in the place of one of those who had so gone out of office as aforesaid. That at the conclusion of the said election defendant, so being the mayor of the said borough as aforesaid, and the said two assessors, did together then and there examine the voting papers delivered to them at the said election, and did then and there ascertain and declare him the defendant to be one of the four burgesses of the said borough having a majority of votes, and to be duly re-elected to be a councillor of the said borough in the place of one of the four councillors who had so gone out of office as aforesaid, according to the provisions of the said Act. That the said Osman Pountney, the relator named in the said information, was then and there a duly enrolled burgess of the said borough, and was present and voted at the said election. That defendant, being so elected such councillor as aforesaid, did afterwards, and before he in any way acted as such councillor, as aforesaid (except as in the said Act as in that behalf excepted and permitted), to wit on 3d *November, [*88 1858, make and subscribe the declaration in that behalf prescribed and required in and by the said Act, and then and there accepted and took upon himself the said office of a councillor of the said borough of Bewdley. Verification.

Demurrer. Joinder in demurrer.

Huddleston, in support of the demurrer.—The election was bad. First, there was no vacancy in the council. By sect. 31 of stat. 5 & 6 W. 4, c. 76, one-third of the councillors go out of office on the 1st November in each year. But sect. 26 enacts, "that the mayor and aldermen shall, during their respective offices, continue to be members of the council of the borough, notwithstanding anything hereinafter contained as to councillors going out of office at the end of three years." The defendant, therefore, as mayor, still remained a member of the council at the time of the election of councillors set forth in the plea. [CROMPTON, J.—The mayor is, in fact, a supernumerary in the council until the 9th November, when the new mayor is elected. Lord CAMPBELL, C. J.—He remains a member of the council but not a councillor.] Secondly, the defendant, as mayor, could not join in returning himself as a councillor. It is a general principle that a returning officer cannot return himself: Dalton on the Office and Authority of Sheriffs, p. 332; May's Parliamentary Law, ¶ 38. [Lord

CAMPBELL, C. J.—Sir Edward Coke was made sheriff of Bucks, in order to prevent his being returned as member for the county.] It will perhaps be contended, on the authority of *Regina v. Ledgard*, 8 A. & E. 535 (E. C. L. R. vol. 35), that the mayor's duties, as returning officer, are purely ministerial. But, though he may not *89] examine into the qualifications of the voters, his duties are not merely ministerial. He has to examine the voting papers, and to see that they are in the proper form; *Regina v. Tart*, 1 E. & E. 618 (E. C. L. R. vol. 102); and, in the case of an equality of votes for two or more candidates, he might have to give a sort of casting vote. So that, in such case, he might, if it were lawful for him to be a candidate at all, assist in giving such a vote in his own favour. Sect. 36 provides for the election of one of the aldermen to act as mayor in case of the mayor being "dead, absent, or otherwise incapable of acting" "with respect to elections:" but it makes no provision enabling the mayor during his term of office, and while, in consequence, he is the returning officer for the whole borough (if not divided into wards), to be a candidate for the office of councillor. There are no wards in Bewdley, and therefore the defendant was ineligible.

Pigott, Serjt., contra.—The first point came incidentally before the Court in *Frost v. Mayor of Chester*, 5 E. & B. 531 (E. C. L. R. vol. 85), although the decision turned upon the question as to what was the proper mode of impeaching the election. [Lord CAMPBELL, C. J.—We will hear you upon that point if you succeed in showing that the second objection is not tenable.] As to the second point: the duty of the mayor, at an election of councillors, is purely ministerial; and the re-election of the defendant as councillor was not invalid by reason of his having, on that election, acted as returning officer. The rule which prohibits a sheriff from returning himself as member for *90] the county, is founded upon reasons which do not apply to the present case. The mayor here does not act alone. [WIGHTMAN, J.—If the two assessors differed, on an equality of votes, the mayor might then have to give a sort of casting vote, and so would act judicially.] In *Regina v. Ledgard*, 8 A. & E. 535, 545 (E. C. L. R. vol. 35), Patteson, J., in giving his judgment, says, "If the returning officer were to take it on himself to decide on the qualification, no better mode of fraud could be devised: for he might assume the want of qualification, and put the borough to a quo warranto. The Act studiously makes the returning officer ministerial for the purpose of summing up the votes, and declaring the party who has the greatest number to be elected. It is no business of his whether the candidate be qualified or not; I do not know that he would be bound to notice his not being on the burgess-roll." Sect. 28 enacts, that no person shall be qualified to be elected, or to be a councillor or an alderman, "during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council." The tenure of office as mayor is therefore excepted from the list of disqualifications given in that section. [CROMPTON, J.—This is not an objection to the qualification of the mayor to be elected a councillor, but to his returning himself as a councillor, while acting as returning officer.] All the grievances suggested by the other side might happen

if the candidate were a friend of the mayor, just as much as when the mayor himself was a candidate; yet it cannot be contended that the mayor could not return a friend.

LORD CAMPBELL, C. J.—I am of opinion that our *judgment should be for the relator. The question is whether this elec- [*91] tion of the mayor as a councillor, he himself acting at the election as returning officer, was valid. Upon the maxim that no one shall be judge in his own cause, I am of opinion that a returning officer cannot be allowed, at the election over which he presides as such returning officer, to return himself. The duties of the mayor of a borough, as returning officer, are not purely ministerial. He has to decide whether the votes are given in proper form, and, from time to time, to determine a variety of questions of considerable nicety, which are sometimes brought afterwards before this Court. He may often, on these occasions, have the opportunity of favouring his own views, and of being judge, so to speak, in his own cause; and therefore the maxim which I have cited applies, unless there be something in the Act which enables that to be done which otherwise could not be done. Sect. 28, when properly examined, does not bear out the construction contended for by the defendant. It enacts merely that a mayor is not to be ineligible as a councillor by reason of his office; not that the mayor, when acting as returning officer, may return himself as a councillor. Sect. 36 gives the means of substituting an alderman, to preside as returning officer at elections, whenever the mayor, from whatever reason, is "incapable of acting," and thus meets the very difficulty which may arise from the mayor being a candidate for election as a councillor. If, while acting as returning officer, he is proposed as a candidate, he is ineligible; just as a sheriff, if proposed as member for his county, would be ineligible, and would be bound, as returning officer, to refuse to receive any votes for himself.

*WIGHTMAN, J.—The mayor, being returning officer, has [*92] returned himself; and the question is, whether he has the power to do so. It is said that his duty, as returning officer, is simply ministerial. But that is certainly not so. He has to examine the voting papers, and, though he has not to decide upon the qualification of the voters, he has to see that they give their votes in proper form. Many difficult questions, decided by the mayor on these occasions, have come before this Court. All the objections against a returning officer returning himself apply in this case. Sect. 28, which has been relied upon for the defendant, provides only that the mayor shall not be ineligible by reason simply of his being mayor: it gives no power to the mayor, while acting as returning officer, to return himself: and if, while so acting, he is proposed as a candidate, he is clearly ineligible.

ERLE, J.—I am of the same opinion. The rule of law, that a man cannot be judge in his own cause, applies here. The mayor's duty, as returning officer, is not merely a mechanical one; many cases in this Court show that questions of great difficulty often arise for his decision at these elections, where great artifice is frequently exercised in order to insure the return of particular candidates. Sect. 28 has been relied on as showing that the mayor is not disqualified from

being elected. But that means, not disqualified simply as *mayor*: so that, where a borough is divided into wards, he might be elected in the ward where he is not returning officer. But it is clear to me that, while the mayor is acting as returning officer, the statute gives him no power to return himself; and such power would be directly contrary to the general rule of law which I have stated.

*93] *CROMPTON, J.—I am also of opinion that this election was void. The general rule, that a returning officer cannot return himself, applies to the present case. I do not think that the duty of the mayor, as returning officer, is simply ministerial: he has sometimes to exercise judicial functions of considerable importance. As to sect. 28, it is clear that, though it provides that the office of mayor shall not render a man ineligible as a councillor, it gives no power to the mayor, while acting as returning officer, to elect himself. I rather doubt whether sect. 36, empowering the appointment of a substitute when the mayor is incapable of acting, was intended to apply to such a case as this. The mayor is eligible, where he is not returning officer; as, for instance, where a borough is divided into wards, in a ward where he is not returning officer: but here, acting as returning officer, he has returned himself; and the election is void.

Judgment for the Crown.

TAMVACO and Others v. LUCAS and Others. *June 13.*
[Reported 1 E. & E. 592 (E. C. L. R. vol. 102)].

*94] *The MAGDALENA Steam Navigation Company v. MARTIN. *June 14.*

The public minister of a foreign State, accredited to and received by the Sovereign of this country, having no real property in England, and having done nothing to disentitle him to the general privileges of such public minister, cannot, while he remains such public minister, be sued against his will, in this country, in a civil action; although such action may arise out of commercial transactions by him here, and although neither his person nor his goods be touched by the suit.

THE declaration alleged that The Magdalena Steam Navigation Company was, before 3d November, 1856, completely registered and certified under stats. 7 & 8 Vict. c. 110, and 10 and 11 Vict. c. 78; that the Company was on that day duly registered and certified and incorporated under The Joint Stock Companies' Act, 1856, 19 & 20 Vict. c. 47; that before and at the time of the passing of the last-mentioned Act, and from thence hitherto, defendant was a shareholder in the Company, and entitled to one hundred shares in the capital stock of the Company, and was, in the register of shareholders of the Company, registered as such shareholder and as the holder of the said one hundred shares, and was at the time of the commencement of the winding up of the Company, and thence hitherto, in respect of the said one hundred shares, a contributory of the Company within the meaning of the last-mentioned Act; that, on 10th March, 1857,

it was resolved, at an extraordinary general meeting of the Company, that the Company should be wound up voluntarily pursuant to the said Act; that this resolution was confirmed at another general meeting held on 6th May, 1857, when a liquidator was appointed, who, on 22d April, 1858, made a call of 6l. per share on all the shareholders of the Company in respect of the shares held by them in the capital stock of the Company, payable on 6th May then *next; that [*95 defendant had notice of the call, and was requested to pay 600l., the amount of it payable by him; that everything had happened and every condition had been observed to render defendant liable, and the time for payment of the call had elapsed before action. Breach, that defendant had made default in paying the call, and that it was still due.

Plea, by defendant in person. That he ought not to be compelled to answer in this action, because he says that he was and is an alien born, and never was nor is a subject of Her Majesty the Queen or any of Her predecessors, by naturalization, denization or otherwise; and that, at the time of the accruing of the said cause of action in the declaration mentioned, and at the time of the commencement of this action, he was and thence hitherto hath been and still is a public minister of certain foreign States, and authorized and received as such by Her said Majesty, to wit, Envoy Extraordinary and Minister Plenipotentiary of and for the Republics of Guatemala and New Granada respectively, and that he was at the respective times aforesaid, and from thence hitherto hath been and still is, acting as such Envoy Extraordinary and Minister Plenipotentiary as aforesaid, and was not at the respective times aforesaid, or at any time since, and is not now, seised or possessed of any lands, tenements, hereditaments, or real estate, or chattels real, within this realm, and had not at the respective times aforesaid, nor has he at any time since, done any act or thing, nor at the respective times aforesaid, nor at any time since, has there existed, nor does there now exist, any matter or thing by reason or in consequence whereof he has at any time waived, or at the respective times aforesaid had become, or at any time since has become, *or is disentitled to, any of the rights, privileges, or exemptions [*96 of or appertaining to a public minister so authorized, received, and acting as aforesaid, or by reason or in consequence whereof he ought to be compelled to answer in this action; and that the said writ was issued with intent to prosecute and for the purpose of prosecuting this action *to judgment*(a) against him whilst such public minister as aforesaid, and this he is ready to verify; wherefore he prays judgment if he ought to be compelled to answer in this action, &c.

Demurrer. Joinder in demurrer.

Bovill, for the plaintiffs.(b)—The plea is bad. The action lies against the defendant, notwithstanding his character of ambassador. He is sued for a debt due from him in this country, as a member of a trading Company, which has been wound up voluntarily, and therefore, as must be presumed, with his consent. If an ambassador engages in trade in the country to which he is accredited, he thereby becomes

(a) The words in italics were inserted by consent, during the argument, at the suggestion of the Court. See pp. 103-4.

(b) Tuesday, June 7th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.

liable to be sued there in respect of all matters arising out of his mercantile transactions. Vattel states the law on this subject more fully and accurately than any other author. In Book iv. c. 8, s. 113, p. 491 (Chitty's ed., 1834), he says: "The independency of a public minister is the true reason of his exemption from the jurisdiction of the country in which he resides. No legal process can be directly issued against him, because he is not subject to the authority of the *97] prince or the magistrates. *But it is asked whether that exemption of his person extends indiscriminately to all his property?" He then proceeds to discuss to what property of the ambassador the exemption extends; and comes to the conclusion that it is limited to such personal property as is necessary and incident to his character as ambassador; and that it does not apply to his immovable property, real estate, or property as a trader. This is laid down in sect. 114 as follows: "But this exemption cannot extend to such property as evidently belongs to the ambassador under any other relation than that of minister. What has no affinity with his functions and character cannot partake of the privileges which are solely derived from his functions and character. Should a minister, therefore (as it has often been the case), embark in any branch of commerce, all the effects, goods, money and debts, active and passive, which are connected with his mercantile concerns;—and likewise all contests and lawsuits to which they may give rise,—fall under the jurisdiction of the country. And although, in consequence of the minister's independency, no legal process can, in those lawsuits, be directly issued against his person, he is nevertheless, by the seizure of the effects belonging to his commerce, indirectly compelled to plead in his own defence." Although, therefore, an ambassador's person is in all cases privileged, Vattel is a distinct authority to show that an action will lie against him in his trading capacity. If so, there is no breach of his privilege in bringing such an action; still less in continuing it after he has put in an appearance, as the present defendant has done. If the defendant wished to dispute the jurisdiction his proper course was to apply to have the proceedings set aside; just as, in many instances, of *98] *which *Triquet v. Bath*, 3 Burr. 1478, is one, persons having the privilege of ambassadors or the servants of ambassadors have applied to have bail-bonds cancelled, which they had given or filing common bail. In Grotius de Jure Belli et Pacis, lib. 2, c. 18, s. 9, it is stated: "*Bona quoque legati mobilia, et quæ proinde habentur personæ accessio, pignoris causâ, aut ad solutionem debiti capi non posse, nec per judiciorum ordinem, nec, quod quidam volunt. manu regiâ, verius est; nam omnis coactio abesse a legato debet, tam quæ res ei necessarias quàm quæ personam tangit, quo plena ei sit securitas. Si quid ergo debiti contraxit, et, ut fit, res soli eo loco nullas possideat, ipse compellendus erit amicè, et, si detrectet, is qui misit, ita ut ad postremum usurpentur ea, quæ adversus debitores extrâ territorium positos usurpari solent.*" Although then, no compulsion, or "coactio" can be employed, an ambassador may be brought into court "amicè," that is, so long as his ambassadorial character, and his personal privilege, are not interfered with; just as proceedings may be instituted against debtors who are without the territory. His person, it is true, must not be molested, nor may the bulk of his goods

be taken in execution; but a suit may be brought against him, though it may end in process against such of his goods as he has as a trader. [Lord CAMPBELL, C.J.:—Does our municipal law deprive an ambassador of any of his immunities if he engages in trade? Stat. 7 Anne, c. 12, s. 3, contains no such limitation upon his exemption from suits as you seek to establish.] The only express authority upon the point to be found in the books is *Barbuit's Case*, Cas. temp. Talbot 281, which is often quoted as a decision that an ambassador does not lose his privilege by engaging in trade. That doctrine, however, is to be found there merely in a note by the reporter; which enunciates nothing more than that an ambassador, though he trades, retains his personal privileges, e. g. the privilege from arrest. It is consistent with what is there said, that his goods may not be privileged under such circumstances. In 4 Inst. 153, Lord Coke, after saying that "if a foreign ambassador, being prorex, committeth here any crime which is contra jus gentium, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador, as unworthy of so high a place, and may be punished here, as any other private alien," adds "and so of contracts that be good jure gentium he must answer here." In R. Phillimore's Commentaries upon International Law, vol. ii., part 6, c. 8, the following passages occur. Sect. 176. "We have now to consider the exemption of the ambassador from the jurisdiction of the civil tribunals of the country to which he is accredited. With respect to this subject, the privileges of extra-territoriality have been established by the universal consent and custom of all civilized nations, in order to secure the sanctity of the ambassador: they have been thrown up from time to time, as out-works to the citadel." Sect. 178. "Nevertheless, the exemption of the ambassador, his family and his suite, from the jurisdiction of the civil as well as the criminal tribunals of the country in which he was resident, is not absolutely necessary for the preservation of the inviolability of the ambassador. 'Persona,' Bynkershoek truly remarks, 'quantumvis sancta, solâ in jus vocatione non violatur.'" Sect. 180. "It was a further extension of the fiction of extra-territoriality to render the ambassador's personal property exempt from arrest." "It has not yet been, and probably never will be, extended to real property, if an ambassador should happen to possess any in the country of his mission. The territorial possession is in no way attached to the character of the ambassador. The fiction of extra-territoriality cannot be applied to immovable possessions, and there is no doubt that they, with their incidents, remain subject to the jurisdiction (forum reale) of the country in which they are situate." In sect. 181, the author says, "There are some exceptions, moreover, to the privilege respecting personal property, viz.:—1. When the ambassador becomes a trader or a merchant, in the country to which he is sent, the property embarked by him, or accruing to him, in this capacity, is liable to seizure and condemnation, at the instance of creditors, in the same manner as the property of any other trader or merchant." "The law was correctly laid down on this subject of the merchant-ambassador by the Dutch Tribunal, in 1720–1, when the Envoy Extraordinary of the Duke of Holstein was sued by his creditors for

mercantile debts contracted by him; and the Courts at the Hague granted a degree of arrest and citation against him. The arrest was to operate on all goods, money and effects within the jurisdiction of the tribunal, with the exception of the movables, equipages, and other things belonging to him in the character of ambassador."^(a) "This instance is memorable, not merely on account of the correct enunciation of the law to which it gave rise, but also because it furnished Bynkershoek with the occasion of writing his excellent treatise 'De Foro Legatorum.'" *Wheaton's Elements of International Law, part

*101] iii. c. 1, § 18, is to the same effect. "The personal effects or movables belonging to the minister, within the territory of the State where he resides, are entirely exempt from the local jurisdiction; so also of his dwelling-house; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed, as a merchant carrying on trade, or in fiduciary character as an executor, &c., exempt from the operation of the local laws." With this agrees Martens, Précis du Droit des Gens, lib. vii. c. 5, s. 3 (Cobbett's Translation, 1802), where treating of the exceptions to the general rule that an ambassador and his property are exempted from the civil jurisdiction of the State, he says: "With respect to property, that which belong to him in any other quality than that of minister is subject to the jurisdiction of the State, and may be seized on for causes not relative to the quality of minister: though, strictly speaking, the property belonging to him as minister is exempt from seizure, during the time of his mission, yet, the mission once terminated, if he attempts to quit the State without paying his debts, the State may refuse to let him depart, or, at least, to carry away his property; and may even seize on this latter." The Emperor of Brazil v. Robinson, 5 Dowl. 522, shows that even a foreign potentate, if he sues here, in a cause arising out of commercial transactions, may be made to find security for costs. De Wicquefort, a most strenuous advocate of the privileges of ambassadors, gives an instance in which

*102] an ambassador is amenable to the law of the country *where he resides, namely, where he has taken a house and refuses to give up possession at the end of the lease. The passage occurs in the author's *L'Ambassadeur et ses Fonctions*, tome premier, liv. i. sect. 28. p. 426 (ed. Amsterdam 1730), where it is said: "*L'Ambassadeur qui auroit loué une maison, est obligé d'en sortir à la fin du bail, s'il ne l'a pas voulu continuer; s'il ne le veut pas faire, il y peut estre contraint par la justice du lieu; parce que le propriétaire qui a loué sa maison à un autre, ou qui y veut venir demeurer lui-mesme, estant obligé d'accomplir ce qu'il a promis d'ailleurs, ou ne pouvant lui-mesme coucher dans la rue, l'ambassadeur doit satisfaire au contract, et mesme y peut estre contraint.*" The decision in *Taylor v. Best*, 14 Com. B. 487 (E. C. L. R. vol. 78), though it upholds the doctrine of an ambassador's personal immunity, unless he attorns to the jurisdiction, does not show that under no possible circumstances can a writ be issued against him. Maule, J., is there reported as saying, during the argument (p. 493), "The cases you rely on are cases of *personal* privilege of the ambassador. It may be that his person or his goods

(a) Referring to Bynkershoek de Foro Legatorum, capp. xiv, xvi.

may be sacred ; but why should the plaintiff be deprived of the means of ascertaining the debt?" Again, he says (p. 516), "What more is done by a proceeding in our Courts without arrest, than is done by the *epistola* of the civil law?" So, Jervis, C. J., in giving judgment, says (p. 521), "It is said,—and perhaps truly said,—that an ambassador or foreign minister is privileged from suit in the Courts of the country to which he is accredited, or, at all events, from being proceeded against in a manner which may ultimately result in the coercion of his person, or the seizure of his personal effects necessary to his comfort and *dignity ; and that he cannot be compelled, [*103 in invitum, or against his will, to engage in any litigation in the Courts of the country to which he is sent. But all the foreign jurists hold, that if the suit can be founded without attacking the personal liberty of the ambassador, or interfering with his dignity or personal comfort, it may proceed." And Maule, J., in his judgment (p. 523), thus expresses himself: "Whether an ambassador or public minister duly accredited to the Queen" "is so far privileged as to be free from all liability to be sued in the Courts of this country, is a very grave question, and one which does not seem to have been settled by any judicial determination in our Courts, or indeed elsewhere." "It is a point which is very fit to be considered whenever it may be properly presented for decision," "whether an ambassador or public minister can be brought into Court against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined." All these authorities show that there are cases in which a suit will lie against an ambassador, although, by reason of his privilege, process cannot be issued, in the suit, against his person, or such of his goods as are connected with his dignity. [Lord CAMPBELL, C. J.—I feel some difficulty in understanding how a suit can be brought against him without some degree of personal "coactio."] At all events, a writ may be taken out against him, for the purpose of saving the Statute of Limitations, even supposing that the action cannot be prosecuted to judgment while he continues ambassador. The plea does not aver that the writ was issued for the purpose of prosecuting *the action to judgment. [Lord CAMPBELL, C. J., here sug- [*104 gested that the plea might be amended by inserting the words "to judgment"; and, with *Bovill's* consent the amendment was made.] The general principle that an ambassador, if a trader, may be sued, justifies the prosecution of the action even to judgment. The plaintiffs are entitled, according to Maule, J.'s, opinion in *Taylor v. Best*, 14 Com. B. 487, 493 (E. C. L. R. vol. 78), to have the amount of the debt due to them judicially ascertained ; and, should the defendant cease hereafter to be ambassador, they might then take out execution on the judgment.

Sir *Fitzroy Kelly*, Attorney-General, contra.—There is no jurisdiction in the Courts of this country to implead an ambassador, or call upon him to answer, in a suit for a civil claim. Criminal proceedings alone can be taken against him, under certain circumstances not material to the present discussion. While he is clothed with the character of ambassador, the civil tribunals of the country to which he is accredited have no jurisdiction whatever to entertain a suit against

him; and any such suit is illegal and void ab initio. Stat. 7 Anne, c. 12, is a legislative declaration to that effect; and merely expresses the law of nations on the subject, as it is stated by Vattel and all the great text writers on that law. [ERLE, J.—The first section of the statute is confined to the particular case, which had happened, of the arrest of the Russian ambassador. Lord CAMPBELL, C. J.—And it does not appear that that ambassador had engaged in trade.] Quoad that particular case, the statute simply declares the general law of nations. The words “be it *therefore declared” are used in *105] sect. 1. But, by sect. 8, it is “further declared” “that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince, or state, authorized and received as such by Her Majesty, her heirs or successors, or the domestick, or domestick servant of any such ambassador, or other publick minister, may be arrested and imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.” Sect. 8, therefore, is a declaration that the law of nations shall be deemed to apply to all future cases of process sued out against any ambassador to this country; and, when read with sect. 4, by which it is “enacted” that those who issue or put in force such process shall be liable to punishment, it amounts to a prohibition of the issue of any such process. Lord Mansfield takes this view of the statute in *Triquet v. Bath*, 3 Burr. 1478, 1480, where he says: “This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Anne, c. 12, is declaratory of it. All that is new in this Act, is the clause which gives a summary jurisdiction for the punishment of the infractors of this law.” [ERLE, J.—Does not sect. 8 apply only to process whereby the person may be arrested? It was the issue of a writ against the person of the Russian ambassador which gave occasion for the statute.] In *Barbuit's Case*, Cas. temp. Talbot 281, the proceedings sought to be set aside had been taken in Chancery. That case, therefore, is an au- *106] thority that the statute of *Anne applies to other proceedings thanailable process. [ERLE, J.—All that is said about an ambassador, in the judgment in that case, is extra-judicial. The decision was, that the applicant, being only a consul, was not entitled to the privilege, whatever that might be, of an ambassador.] All the authorities show that an ambassador's person is absolutely privileged from molestation. Personal service of the writ (which might happen) would be a violation of that privilege. It is said that the action lies against the present defendant because he is a trader. But, even if that were so, the declaration would be insufficient; for it contains no allegation that he is a trader, or has goods quâ trader, so as to bring the case within the alleged exception from privilege; and the fact is, that he is not a trader, and has no such goods. It has, however, never been decided in this country that an action lies against an ambassador if he has engaged in trade. The argument on the other side is founded on the dicta of Maule, J., in *Taylor v. Best*, 14 Com. B. 487, 523 (E. C. L. R. vol. 78), which are wholly unsupported by authority. Possibly it may be the law that, in exceptional cases,

proceedings taken in rem, e. g., in bankruptcy, and against private persons, may be continued, although they may prove to involve the rights of an ambassador. But no original proceedings can be taken against an ambassador. If his goods and person are, by the law of nations, privileged, it is an inconsistency, and a mockery of that privilege, to say that he can, nevertheless, be sued as a trader, and so be compelled either to come in and defend the action, or to have a judgment signed against him. Can it be said that he is compellable to come forward as a witness, or to answer *interrogatories in the action? But if the action is sustain- [*107] able he may practically be obliged to do so, in order to avoid a judgment. The authorities are conclusive, as to his absolute immunity from suit in all cases. In Vattel, bk. IV. c. 7, s. 92, p. 469 (Chitty's ed. 1834), it is said: "The inviolability of a public minister, or the protection to which he has a more sacred and particular claim than any other person, whether native or foreigner, is not the only privilege he enjoys; the universal practice of nations allows him, moreover, an entire independence on the jurisdiction and authority of the state in which he resides." So again, in chap. 8, s. 110, p. 488: "Some authors will have an ambassador to be subject, in civil cases, to the jurisdiction of the country where he resides,—at least in such cases as have arisen during the time of his embassy; and, in support of their opinion, they allege that this subjection is by no means derogatory to the ambassadorial character; 'for,' say they, 'however sacred a person may be, his inviolability is not affected by suing him in a civil action.' But it is not on account of the sacredness of their person that ambassadors cannot be sued: it is because they are independent of the jurisdiction of the country to which they are sent; and the substantial reasons on which that independency is grounded may be seen in a preceding part of this work.(a) Let us here add, that it is in every respect highly proper, and even necessary, that an ambassador should be exempt from judicial prosecution even in civil causes, in order that he may be free from molestation in the exercise of his functions." The ambassador, in fact, is supposed, to all intents and purposes, to be residing in his own *country. [*108] The case cited on the other side, from Bynkershoek, de Foro Legatorum, cap. xiv., is no authority. It was not the case of an original action against an ambassador; but of a decree of arrest against his goods, granted at the instance of his creditors. Bynkershoek says that the States General had called upon the Court to justify this decree, and were still deliberating on the answer of the Court, which, in his opinion, was not based upon satisfactory reasons. His own opinion as to the immunity of an ambassador from suit is plainly laid down in cap. xvi., where he says: "Legatum, ut instructus et cum instrumento est, liberum esse volo. Nego igitur eum conveniri posse." He then guards himself against being supposed to hold that process against an ambassador's goods cannot in any case be issued. "Nolim tamen quisquam ita existimet nullo planè modo conveniri posse legatum, ubi degit, quin, si me audias, poterit aliquando." "Scilicet in regionibus ubi ob bona convenimur, et ex eorum arresto forum sortimur, nullus dubito, quin et legatorum bona arresto detineri,

(a) Book IV. c. 7, s. 92.

et per hoc ipsi in jus vocari possint. Bona, dico, sive immobilia, sive mobilia, dummodo neque ad personam ejus pertineant, neque, tanquam legatus, possideat, uno verbo, sino quibus legationem rectè obire potest." That is to say, an ambassador may be indirectly constrained to come in and defend a suit, by the seizure of his goods, in countries where such process is permissible. But it by no means follows that, even in such countries, he can be compelled to intervene, if he chooses to let his goods go rather than to submit to the jurisdiction. And certainly there can be no jurisdiction in the Courts of this or any other country, to entertain a suit involving molestation to his person, unless he voluntarily makes himself a party to the suit. This is

*109] *clearly implied in Wheaton's Elements of International Law, part III. c. 1, § 16, I., where it is said that the ambassador's "exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law." Wadsworth v. The Queen of Spain, 17 Q. B. 171 (E. C. L. R. vol. 79), De Haber v. The Queen of Portugal, Id., show that an action will not lie in this country against a foreign potentate sued as such; and the same law is applicable to an ambassador, who is the representative here of his Sovereign. In The Duke of Brunswick v. The King of Hanover, 6 Beav. 1 (and, on appeal to House of Lords, 2 H. L. Ca. 1), it was conceded that a foreign Sovereign is exempt from the jurisdiction of our Courts for acts done in his public character. [Lord CAMPBELL, C. J.—There can be no doubt, from those cases, that an ambassador is not liable to be sued in this country for acts done by him in his public capacity.] An ambassador is in no way liable to the jurisdiction, in civil matters, of the municipal Courts of the country to which he is accredited. This is plainly laid down, as follows, in Stephen's Commentaries on the Laws of England, vol. 2, p. 497 (4th ed.): "The rights, the powers, the duties and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws

*110] were made: *but an ambassador ought to be independent of every power except that by which he is sent, and of consequence ought not to be subject to the mere municipal laws of that nation wherein he is to exercise his functions." It cannot be contended that the defendant has, by appearing to the writ, precluded himself from saying that the suit is improperly brought. [Lord CAMPBELL, C. J.—His plea denies that the Court has jurisdiction. ERLE, J.—Supposing that he had made an affidavit in Court, and had moved to stay proceedings, it could not have been said that he thereby admitted the jurisdiction. Lord CAMPBELL, C. J.—The plea is only another mode of doing that.] That is so. Lastly, the plea is good as showing ground for a suspension of the writ, at all events for so long as the defendant remains an ambassador; just as a plea of the plaintiff's excommunication used to suspend a writ until the plaintiff had procured letters of absolution: Co. Litt. sect. 201.

Bovill, in reply, admitted that stat. 7 Anne, c. 12, is merely declaratory of the law of nations, and referred to *Heathfield v. Chilton* 4 Burr. 2016, in which Lord Mansfield repeated the opinion which he had before expressed to that effect in *Triquet v. Bath*, 3 Burr. 1478. He relied on the authorities cited in his argument, as proving that the action was maintainable by the law of Nations, and suggested instances (which are noticed in the judgment of the Court) in which the doctrine that an ambassador is in all cases wholly exempt from the civil jurisdiction of our Courts would give rise to serious inconveniences.

Cur. adv. vult.

*Lord CAMPBELL, C. J., now delivered the judgment of the Court. [*111

The question raised by this record is, whether the public minister of a foreign state, accredited to and received by Her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued, against his will, in the Courts of this country, for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. The defendant is accredited to and received by Her Majesty as Envoy Extraordinary and Minister Plenipotentiary for the Republics of Guatemala and New Granada respectively; and a writ has been sued out against him and served upon him, to recover an alleged debt, for the purpose of prosecuting this action to judgment against him whilst he continues such public minister. He says, by his plea to the jurisdiction of the Court, that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favour. The great principle is to be found in Grotius de Jure Belli et Pacis, lib. 2, c. 18, s. 9, "Omnis coactio abesse a legato debet." He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority [*112 who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. The counsel for the plaintiffs, admitting that the person of an ambassador cannot be lawfully imprisoned in a suit, and that his goods cannot be taken in execution, contended that he might be cited and impleaded; and he referred to the decision of the tribunal at the Hague, in 1720, which is reported by Bynkershoek, and was the cause of that great jurist writing his valuable treatise De Foro Legatorum. But this case is to be found in chap. xiv., entitled "De Legato Mercatore," in which is explained the exception of an ambassador engaging in commerce for his private gain. The Envoy Extraordinary of the Duke of Holstein to the States General, leaving the Hague, where he ought to have resided, "Amsterdamum se confert, et strenuè mercatorem agit. Plurimum

debitor factus, Hagam revertitur, sed et plures curiam Hollandiæ adeunt, et impetrant mandatum arresti et in jus vocationis." The arrest was granted to operate on all goods, money, and effects within the jurisdiction of the tribunal, with the exception of the movables, equipages, and other things belonging to him in his character of ambassador. But this citation was entirely in respect of his having engaged in commerce, and shows that otherwise he would not have been subject to the jurisdiction of the Dutch Courts. Lord Coke's authority (4 Inst. 153) was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed contrà jus gentium, as treason, felony, adultery, or any other crime which is against *113] the law of nations, he *loseth the privilege and dignity of an ambassador, as unworthy of so high a place," he adds, "and so of contracts that be good jure gentium he must answer here." There does not seem to be anything in the contract set out in this declaration contrary to the law of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist.

Mr. *Bovill*, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor v. Best*, 14 Com. B. 487, 493 (E. C. L. R. vol. 78), (per Maule, J.), it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her *114] ministers. *It is allowed that he would not be bound to answer interrogatories, or to obey a subpoena requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000*l.*, or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpoena witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without "coactio" to the ambassador? Then, what benefit does it produce to the plaintiffs? There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall. In countries where there may be a citation by seizure of goods, if an ambassador loses his privilege by engaging in commerce, he not only may be cited,

but all his goods unconnected with his diplomatic functions may be arrested to force him to appear, and may afterwards, while he continues ambassador, be taken in execution on the judgment.

Reference was frequently made during the argument to stat. 7 Anne, c. 12; but it can be of no service to the plaintiffs. The 1st and 3d sections are only declaratory of the law of nations, in conformity with what we have laid down; and the other sections, which regulate procedure, do not touch the extent of the immunity to which the ambassador is entitled. The Russian ambassador had been taken from his coach and imprisoned; but the statute cannot be considered as directed only against bailable process. The writs and processes described in the 3d section are not to be confined to such as directly touch the person or goods of an ambassador, but extend *to such as, in their usual consequences, would have this effect. [*115] At any rate, it never was intended by this statute to abridge the immunity which the law of nations gives to ambassadors, that they shall not be impleaded in the Courts of the country to which they are accredited. An argument was drawn from the course pursued in some instances of setting aside bail-bonds given by persons having the privilege of ambassadors, or their servants, on filing common bail. This, perhaps, is as much as could reasonably be asked on a summary application to the Court, but does not show that the action may not be entirely stopped by a plea regularly pleaded to the jurisdiction of the Court.

Some inconveniences have been pointed out as arising from this doctrine, which, we think, need not be experienced. If the ambassador has contracted jointly with others, the objection that he is not joined as a defendant may be met by showing that he is not liable to be sued. As to the difficulty of removing an ambassador from a house of which he unlawfully keeps possession, De Wicquefort, and other writers of authority on this subject, point out that in such cases there may be a specific remedy by injunction. Those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the government by which the ambassador is accredited. Such inconveniences are trifling, compared with those which might arise were it to be held that all public ministers may be impleaded in our municipal Courts, and that judgment may be obtained against them in all actions, either *ex contractu* or *ex delicto*. It certainly has not hitherto been expressly decided that a *public minister duly accredited [*116] to the Queen by a foreign state is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant.

Judgment for the defendant.

The privileges of ambassadors by international law are sanctioned by the Act of Congress, 30th April 1790, sections 25-6. The object of the statute was simply to enforce, not to limit the privileges which are created and defined by international law: *Holbrook v. Henderson*, 4 Sandf. S. C. (N. Y.) 619.

The state Courts are also bound to aid in carrying out this act by quashing proceedings against one having such privileges. *Ex parte Cabrera*, 1 W. C. C. R. 232.

BREWIN and Others, Assignees of WARNER, v. BRISCOE.
June 14.

On 22d November, 1858, a *fi. fa.* was put into the premises of W., a trader, on a judgment obtained by B. (the now defendant) in an action of B. v. W. On 23d November W. committed an act of bankruptcy, by absenting himself. On 24th November the goods seized under the *fi. fa.* were advertised for sale by auction, and two creditors of W., on the same day, gave a written notice to the auctioneer and the sheriff's officer in possession, that W. had committed an act of bankruptcy. On the same day, U., an attorney, who had acted as agent for P. & S., B.'s attorneys in the action, in the service of the writ of summons upon W., was informed by the attorney of the two creditors that W. had committed an act of bankruptcy. P. & S. on the same day wrote to U. the following letter, headed "B. v. W." "The sheriff is in possession here, and we have expected that bankruptcy would ensue. We saw defendant last evening, and as he did not appear to contemplate such a step, we think it desirable to endeavour to get an assignment from the sheriff, as we should then have an opportunity of disposing of the stock, &c., to the best advantage. We will therefore thank you to see the officer; and if an inventory has been taken, the matter could be readily completed. You will be good enough to let this have your immediate attention, as if anything is to be done it must be done quickly." On 25th November, and after the receipt of this letter, U. was told, both by the auctioneer and by the sheriff's officer, that notice of an act of bankruptcy by W. had been served on them. U., however, then directed the officer to get a bill of sale of the goods executed by the sheriff to B. After this, on the same day, U. wrote to P. & S.; "I fear my services have been called in when too late," "although, I believe, no petition has been presented as yet." The bill of sale of the goods to B. was executed by the sheriff on 26th November. On a later hour of the same day a petition in bankruptcy was filed against W., and, on 27th November, W. was adjudicated bankrupt. U. caused the goods to be sold on 13th and 14th December following.

Held, that U., upon the receipt of P. & S.'s letter of 24th November, became B.'s agent to conduct the execution, with a discretion as to the manner of conducting it; that notice after that to U., of an act of bankruptcy by W., was notice to B.; that U. had such notice before the execution was completed by sale; and that, therefore, W.'s assignees in bankruptcy were, by reason of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 133), entitled to recover against B. in an action of trover for the goods.

DECLARATION in trover, for the conversion by defendant of certain goods belonging to plaintiffs as assignees of Warner, a bankrupt.

*117] *Pleas. 1. Not guilty. 2. That the goods were not plaintiffs' as alleged. 3. That plaintiffs were not assignees as alleged.

After pleading a special case was stated, under Judge's order, for the opinion of the Court, which was to be at liberty to draw any inferences from the facts which a jury might draw.

The case was substantially as follows:—

For many years prior to November, 1858, Mr. Joseph Sims Warner carried on trade as a merchant and manufacturer at Sheffield, and at the date of the petition for adjudication hereinafter referred to was a trader within the meaning of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106). On Monday, 22d November, 1858, Edward Brown, an officer to the sheriff of Yorkshire, entered the dwelling-house, warehouse, and workshops of Warner under a writ of *fi. fa.* on a judgment obtained in an action wherein Briscoe (the now defendant) was plaintiff and Warner defendant, and wherein Messrs. Pinchard & Shelton, of Wolverhampton, were the attorneys for Briscoe. The warrant was endorsed to levy 2383*l.* 10*s.* 9*d.*, besides costs, &c. On the evening of Monday, 22d November, Warner had an interview with the said sheriff's officer in possession under the said writ, and stated to him his (Warner's) intention of going to Wolverhampton the next day (Tuesday) to see Briscoe on the subject of the debt

under the judgment, and try to arrange terms of settlement with him; and said if he succeeded in doing so the officer would be immediately informed thereof. Warner left Sheffield on the Tuesday morning, and before going he told his warehouseman (Cartledge) that he should return the next day. On Wednesday morning, 24th November, an advertisement appeared in The Sheffield Daily Telegraph, *announcing a sale by Mr. John Clayton, auctioneer, by order of the sheriff of Yorkshire, of the whole of Warner's effects, [*118 to take place on the following day. On Tuesday and Wednesday, 23d and 24th November, it became known to several of Warner's creditors that he was from home and that the sheriff's officer was in possession of his effects. About 11 o'clock on Wednesday morning, 24th November, Mr. John Adams, of Sheffield, and Mr. John Crossland, of Sheffield, who then were and are large creditors of Warner, caused the following notice to be served upon the sheriff's officer and also upon the auctioneer:—

"To the Sheriff of Yorkshire, and Mr. E. Brown, his officer, and Mr. John Clayton, auctioneer.

"We, the undersigned, John Adams, of, &c., and John Crossland, of, &c., creditors of Mr. J. S. Warner, of, &c., do hereby give you notice that the said Mr. Warner has committed an act of bankruptcy.

"Dated 24th November, 1858.

"Yours, &c.,

"JOHN ADAMS,

"JOHN CROSSLAND."

On his examination on oath before the Bankruptcy Court, on 18th December, Warner stated that on Tuesday morning, 23d November, he went to Wolverhampton and saw Briscoe's attorneys, but was unable to make any terms with them or to arrange for the withdrawal of the execution. That instead, however, of returning to Sheffield, he went, on Wednesday, 24th November, to Bristol, to see his brother and to consult him as to his affairs, calling at Gloucester on the way to see a friend; that he remained at Bristol till Friday, 26th November, and that on that day he went up to London to see another brother as to his affairs; that he did not, however, in the mean time *write to Sheffield, except to his wife, who did not communicate [*119 anything to his creditors or to the sheriff or his officer, and that he did not return to Sheffield until after he had been declared bankrupt; that he expected the sheriff's officer was selling all his effects in the mean time, and that he was not aware that his presence would be of any avail. On Wednesday, 24th November, Mr. Fretson of Sheffield, who acted as solicitor for Adams and Crossland in the service of the aforesaid notices, was met by Mr. William Unwin, solicitor, Sheffield, who had acted as agent for Briscoe's attorneys in the service of the writ of summons upon Warner in the action against him. Unwin said to Fretson, "I hear you are about making Warner a bankrupt. Pray is there any act of bankruptcy?" And Fretson replied, "Oh yes." On the same Wednesday, 24th November, Messrs. Pinchard & Shelton, attorneys for Briscoe, wrote the following letter to Unwin:—

"Wolverhampton, 24th November, 1858.

"Dear Sir,

"*Briscoe v. Warner.*

"The sheriff is in possession here, and we have expected that

bankruptcy would ensue. We saw defendant last evening, and as he did not appear to contemplate such a step, we think it desirable to endeavour to get an assignment from the sheriff, as we should then have an opportunity of disposing of the stock, &c., to the best advantage. We will therefore thank you to see the officer and, if an inventory has been taken, the matter could be readily completed. You will be good enough to let this have your immediate attention, as, if anything is to be done, it must be done quickly.

"W. UNWIN, Esq.,

"Solicitor, Sheffield."

"Yours truly,

"PINCHARD & SHELTON."

*120] *This letter was received by Unwin on Thursday morning, 25th November, and the same day Unwin met Clayton casually in the street. Unwin said to Clayton, "Why do you not go on with the sale at Warner's?" Clayton replied, "Because a notice was served upon me and the sheriff's officer that Warner had committed an act of bankruptcy." Unwin replied that he did not believe there was any act of bankruptcy, and that he had received a letter from the plaintiff's attorneys that morning, wishing to have a bill of sale immediately; that Brown ought to have realized long before, and that the sheriff would have to pay for his negligence; and that Unwin wished Clayton to see Brown, and tell him (Brown) to call upon Unwin. Brown very shortly afterwards, on the same day, called upon Unwin, and informed him of what Clayton had said. Unwin told Brown that he (Unwin) had received a letter that morning from the plaintiff's attorneys, wishing to have a bill of sale immediately; that it was his, the officer's, duty to have levied before, and that the sheriff would have to pay for his neglect. Brown replied that he had not heard from the plaintiff's attorneys since he received the warrant; that the defendant, Warner, had gone to Wolverhampton to see the plaintiff, to endeavour to compromise the affair; and that when he (Brown) was served with the notice of Warner having committed an act of bankruptcy, he did not know what to do, as he was without instructions from the plaintiff's attorneys. Unwin told Brown that he did not believe any act of bankruptcy had been committed, and that he (Unwin) had received a letter from the plaintiff's attorneys that morning, and that they wished to have a bill of sale immediately, and he (Brown) must get one directly. Brown directed Clayton to *121] take an *inventory of Warner's effects at the warehouse and workshops directly, one having already been taken of the effects at Warner's dwelling-house; and with this inventory Brown went from Sheffield to York the same afternoon, and the bill of sale was executed by the sheriff on the following day. On the same Thursday afternoon, before the officer went from Sheffield to York, Unwin sent to Fretson to ask whether he had filed a petition against Warner, to which Fretson replied, he had not yet done so, but was expecting instructions to do so. On the evening of the same day, Thursday, 25th November, Unwin wrote the following letter to the plaintiff's attorneys:—

"Sheffield, 25th November, 1858.

"Dear Sirs,

"*Briscoe v. Warner.*

"I fear my services have been called in when too late. Your warrant has gone into the hands of a new officer, ignorant of what

was most advisable to be done, and as to whom he should consult. You should have told the officer to see me before entry, and advised me of your warrant going. Had you done so, I would have had an assignment from the sheriff the same day. I have told him to go off to York and complete it now, but I fear it is too late, although I believe no petition has been presented as yet.

"Messrs. PINCHARD & SHELTON,

"Solicitors,

"Wolverhampton."

"Yours faithfully,

"WM. UNWIN."

On the part of Briscoe it is contended that the letters of Pinchard & Shelton to Unwin, and of Unwin to Pinchard & Shelton, of 24th and 25th November, are inadmissible as evidence, on the ground of their being privileged communications. On the part of the assignees *it is contended that they are admissible, and are not privileged. The Court is to be at liberty to admit them if it [*122 should be of opinion that they can be used, or to reject them if it should be of a contrary opinion.

On Friday morning, 26th November, about ten o'clock, Fretson called at Unwin's office, and inquired whether Unwin had filed or was intending to file a petition against Warner; and Unwin replied, that a client had been consulting him upon the propriety of his doing so, but that he had not any instructions. The officer went from Sheffield to York on the Thursday evening, and on Friday morning, 26th November, about a quarter before eleven A.M., the officer obtained from the undersheriff a bill of sale of the goods. About ten o'clock on Friday morning, 26th November, Fretson received instructions from Adams to file a petition in bankruptcy against Warner; and accordingly a petition was duly filed at the Leeds Bankruptcy Court at a quarter past two in the afternoon of that day, and the sheriff and his officer received notice thereof on the same day, and a copy of such notice was sent by the post the same evening to Briscoe, but, being addressed to William Briscoe, of Wetherby Hall, near Wolverhampton, instead of George Briscoe, of Oldfallings, near Wolverhampton, was not received by the defendant until Monday, 29th November. On Saturday, 27th November, the petition in bankruptcy was opened at the Leeds District Court of Bankruptcy, at the Council Hall, Sheffield, when Warner was thereunder declared a bankrupt (the only evidence of an act of bankruptcy being the evidence of the witnesses Fretwell and Cartledge, a copy of whose depositions before the Commissioner accompanied the case, and were to be taken as part thereof so far as the statements in such depositions *were legally evidence. (a) Brewin was on that day duly appointed official [*123

(a) The only material parts of these statements were as follows. Cartledge, Warner's warehouseman, who was examined on Saturday, 27th November, deposed that Warner, on Tuesday morning, 23d November (the day after the sheriff's officer took possession), "came to the warehouse about ten o'clock, and stayed about an hour and a half, when he went away in a cab, and told me that he was going to Wolverhampton; and would write to me that evening, and that he should return the next day. I have not received any letter from him since he so went away, nor have I seen him since. He did not leave me any money when he went away, nor had I any means of satisfying his creditors when they called." Fretwell, Warner's razor manager, also deposed that Warner came to the warehouse on the Tuesday morning and left about half past eleven. He added, "Before Warner went away, he came to me and asked me about some razors, and took away two books which were always kept in the warehouse where I am employed; and I have not been able to find them since. As soon as he was gone, I could

assignee of the estate and effects of Warner. On Monday, 29th November, Warner surrendered to the bankruptcy and signed a consent to the adjudication thereof being advertised. On 18th December, 1858, the other plaintiffs were chosen as, and appointed by the Commissioner as, creditors' assignees. On Friday, 26th November, the bill of sale from the sheriff to Briscoe was sent by the sheriff's officer to Pinchard and Shelton (Briscoe's attorneys) for execution by him, accompanied by the following letter from the sheriff's officer to Pinchard & Shelton:—

"Gentlemen,

"Sheffield, 26th November, 1858.

"I send bill of sale, &c. You will please have both copies executed by Mr. Briscoe and duly attested; and then send both to Messrs. Bell & Company, Bow Church Yard, London, with instructions to have the original stamped with 4*l.* ad valorem stamp, and *124] the counterpart with 5*s.* and the denoting stamp. The sheriff's charges in bill of sale, which include the costs of stamping, amount to 8*l.* 12*s.* 10*d.* I am, gentlemen, yours respectfully,

"Messrs. PINCHARD & SHELTON,

"EDWARD BROWN,

"Solicitors,

"Sheriff's Officer."

"Wolverhampton."

On 27th November, Pinchard & Shelton returned to the sheriff's officer the assignment and counterpart, which had been executed by Briscoe that day, the receipt of which deeds was, on 28th November, acknowledged by the sheriff's officer in the following letter, addressed to Pinchard & Shelton:—

"Sheffield, 28th November, 1858.

"Sirs,

"*Briscoe v. Warner.*

"I have received the deeds this morning, and have men in possession, one at the house and one at the works, since last Monday.

"I am, truly yours,

"Messrs. PINCHARD & SHELTON,

"EDWARD BROWN, S. O."

"Solicitors, Wolverhampton."

Unwin having, after the execution of this assignment and the return thereof to the sheriff's officer, been instructed by Pinchard & Shelton to act for them in the sale of the goods, the officer, upon receiving back the assignment, gave up possession of the effects to Messrs. Eadon, the auctioneers, by order of Unwin, and the officer's charges were afterwards paid to him by Messrs. Eadon. A copy of the deposition of the officer before the Bankruptcy Court accompanied the case.

On 11th December, an advertisement was inserted in the Sheffield newspapers by Messrs. Eadon, the auctioneers, under instructions from *125] Unwin, afterwards ratified by Briscoe's attorneys, announcing a sale by auction of the whole of the said effects on the Monday and Tuesday following, 13th and 14th December; on which days the sale took place on Warner's premises, and realized 1118*l.* 8*s.* 2*d.*, less expenses of sale.

The bill of sale from the sheriff to Briscoe was not filed pursuant

see by the fireplace that a number of papers had been that morning destroyed in his office. He employed about seven workmen on his premises, and none of them have worked since he went away."

to stat. 17 & 18 Vict. c. 36, no affidavit of the execution having been made, nor any copy of the bill of sale having been filed. The Court of Bankruptcy, on 29th January, 1859, made an order vesting in the assignees the goods in dispute. Before action brought a formal demand of the goods, on behalf of the assignees, was served upon Briscoe.

The questions for the opinion of the Court were, whether the facts above stated showed any act of bankruptcy by Warner; and, if so, whether the plaintiffs, as assignees as aforesaid, were at any time entitled to the goods, or any part thereof, as against the defendant. If yes, then judgment was to be entered for them for 1118*l.* 8*s.* 2*d.*, less costs of sale, with costs of suit. If not, then judgment of non pros., with costs of defence, was to be entered for the defendant.

Quain, for the plaintiffs.—First, the facts stated in the case clearly show that an act of bankruptcy was committed by Warner on Tuesday, 23d November. His conduct, in leaving home, on that day, after an execution had been put in, and in remaining absent, without giving any information where he was to be found, or communicating with any one but his wife, furnishes ample evidence that he did “depart from his dwelling-house or otherwise absent himself” “with intent to defeat or delay his creditors;” and so committed an act *of bankruptcy, under The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 67). [Lord CAMPBELL, C. J.— [*126 The Court, at present, is with you, as to this point.] Secondly, the defendant, the execution-creditor, had notice of an act of bankruptcy before the sale of the goods taken in execution was complete. The bill of sale from the sheriff to the defendant was not executed by the sheriff till a quarter to eleven o'clock on Friday morning, 26th November. That, then, is the earliest moment at which the sale can be said to have been complete. But on the morning of the previous day, Thursday, 25th November, Unwin, the solicitor, received from Pinchard & Shelton, Briscoe's attorneys in his action against Warner, the letter of 24th November, the effect of which was to appoint Unwin the agent or attorney of Briscoe for the purpose of procuring the bill of sale from the sheriff. Notice, therefore, to Unwin, after he had received that letter, of an act of bankruptcy committed by Warner, was notice to Briscoe. And that notice was given to Unwin, on the same Thursday, by both Clayton, the auctioneer, and Brown, the sheriff's officer. In *Pike v. Stephens*, 12 Q. B. 465 (E. C. L. R. vol. 64), it was laid down that notice of an act of bankruptcy committed by the execution-debtor is sufficient notice to the execution creditor, if given to the attorney employed by the latter, or to a clerk of such attorney so far intrusted with the management of his business as to have the power of acting on such a communication in his absence. That case was decided on the construction of the Act then in force, 2 & 3 Vict. c. 29, s. 1; which made notice of a prior act of bankruptcy avoid an execution, if the notice had *been given [*127 at “the time of executing or levying such execution or attachment.” The language of stat. 12 & 13 Vict. c. 106, s. 133, is, substantially, the same, as to the persons to be affected by the notice; the latter statute, however, further, makes the notice also avoid the execution if it has been given “at the time of making any sale there-

under." It is no objection to the validity of the notice, in the present case, that Unwin was not informed by Brown or Clayton of the nature or particulars of the act of bankruptcy committed by Warner; *Udal v. Walton*, 14 M. & W. 254,† shows that it was unnecessary to state them. So, in the judgment of the Court in *Hope v. Meek*, 10 Exch. 829, 845,† it is said, "When an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution-creditor before the sale the alleged fact, that an act of bankruptcy has been committed, in a way which ought to induce him as a reasonable man to believe that the notification was true, is in our judgment sufficient notice."

Bovill, contra.—First, Warner did not commit an act of bankruptcy. He did not leave home "with intent to defeat or delay his creditors," but went simply with the object of endeavouring to come to terms with the execution-creditor. [ERLE, J.—Even if that was his original object, he did not return, upon finding that he could not settle the matter. Surely, he remained away in order to delay his other creditors.] Then, secondly, the notice to Unwin, on 25th November, of the act of bankruptcy, was not notice to Briscoe. By that time, certainly, Unwin had received instructions from Briscoe's *128] attorneys; but their letter only constituted him their agent to do a particular thing, viz., to complete the execution. The letter did not give him any general discretion as to how he was to act. He was not therefore in the same position as the attorney in *Pike v. Stephens*, 12 Q. B. 465, who was the attorney employed in the cause. Stat. 12 & 13 Vict. c. 106, s. 133, says nothing as to notice to an agent being sufficient. The words are "Provided the person" "at whose suit or on whose account such execution or attachment shall have issued" had not notice. In *Ramsay v. Eaton*, 10 M. & W. 22,† notice to a sheriff's officer, in possession under a fi. fa. of an act of bankruptcy committed by the defendant, was held not to be notice to the execution-creditor within stat. 2 & 3 Vict. c. 29, s. 1. In *Pennell v. Stephens*, 7 C. B. 937 (E. C. L. R. vol. 62), notice to the clerk of the plaintiff's attorney was held not to be sufficient, under the same statute, to defeat the execution; the clerk to whom it was given not being shown to be a managing clerk, or to have communicated the matter to his principal; and it was doubted whether a notice to one shown to be a managing clerk would suffice. *Rothwell v. Timbrell*, 1 D. N. S. 778, was decided on the ground that the notice was given to the attorney in the cause when he was acting in it as such, and therefore was good notice, under the same statute, to the client: but Coleridge, J., there says, "I by no means say that, in every case, notice to, or knowledge of, the attorney of a party will satisfy" the statute. Assuming, however, in the next place, that Pinchard & Shelton's letter did leave Unwin a discretion how to act, he was not bound to act upon Clayton's and Brown's information. They gave him, not a *129] positive notice that Warner had committed an act of bankruptcy, but notice of a notice to that effect which they themselves had received. In *Hope v. Meek*, 10 Exch. 829,† the information was direct. Here, to adopt the language of Wilde, C. J., in *Pennell v. Stephens*, 7 C. B. 987, 997, "It was not" "sufficient that" Unwin "should be told in that loose way, that an act of bankruptcy

had been committed," "and that the matter should be left there." "The intimation was not given in such a manner and under such circumstances, as to show that it was intended to serve as a notice."^(a)

LORD CAMPBELL, C. J.—As to the first point, it is clear that, by leaving home under the circumstances stated, Warner committed an act of bankruptcy. The question therefore is, whether Unwin was sufficiently constituted the agent of the defendant, the execution-creditor, so as to make notice to Unwin of Warner's act of bankruptcy notice to the defendant. I think that he was. The letter of 24th November, from Pinchard & Shelton, the execution-creditors' attorneys, left Unwin a discretion how to act in carrying out the instructions which it contained; it did not give him a mere authority to execute process at all hazards. Then, had Unwin, afterwards, and before the sale was complete, information which gave reasonable ground for supposing that Warner had committed an act ^{of} [*130 bankruptcy; and which ought to have made Unwin hold his hand? I am of opinion that he had. The statements of Brown and Clayton to him can have left no reasonable doubt upon his mind; and did leave none, as is evident from the letter which he wrote to Pinchard & Shelton on the evening of the same day, 25th November. I am therefore of opinion that the execution-creditor had notice, before the sale, of an act of bankruptcy by Warner; and, consequently, that such notice rendered the sale invalid.

WIGHTMAN, J.—I need add nothing to what has been said as to the commission by Warner of an act of bankruptcy. Upon the question of notice, I think that Briscoe had, before the sale under the *fi. fa.* was complete, sufficient notice of an act of bankruptcy. In the first place, Unwin was a proper person to whom to give that notice. After Unwin had received Pinchard & Shelton's letter of 24th November, he was very much in the position in which a clerk of theirs would have been if sent to conduct the proceedings on the execution. It is clear that that letter left him a discretion to proceed with the sale or not, as he considered most advisable; and that it put him in the position of agent for the execution-creditor. In the second place, Unwin, after the receipt of that letter, and pending the sale, had notice of an act of bankruptcy. It is true that, when Clayton gave him this information, he replied that he did not believe there was any act of bankruptcy; but that answer does not do away with the effect of the notice, it being the fact, at the time, that an act of bankruptcy had been committed.

On the other question, as to the time when the ^{*}execution of the bill of sale was complete, it becomes unnecessary to [*131 give any opinion.

ERLE, J.—I also am of opinion that the execution-creditor had notice of an act of bankruptcy before the sheriff executed the bill of sale. That there was an act of bankruptcy is clear. The question

(a) *Quain*, for the plaintiff, made a further point that the bill of sale was not complete when executed by the sheriff on 26th November, but was then delivered by him as an escrow, not to take effect before the filing of the petition, or until Briscoe also had executed it, and the sheriff had given up possession. *Bovill*, contra, relied upon *Christie v. Winnington*, 8 Exch. 237,† and Lord Campbell, C. J., referred to *Gudgen v. Besset*, 6 E. & B. 986 (E. C. L. R. vol. 38). As the Court expressly abstained from giving an opinion on this point, the arguments and the deposition of Brown, the sheriff's officer, are omitted.

is, was notice of it to Unwin notice to Briscoe? I think that it was; because Briscoe's attorneys had employed Unwin as their agent to complete the execution. Notice to a plaintiff's attorney, employed in the matter, has been held to be sufficient notice to the plaintiff himself. Unwin was, even more than Pinchard & Shelton, for all purposes connected with the execution, Briscoe's attorney. Then, had Unwin notice of an act of bankruptcy? It is clear that he had. He was told both by the auctioneer and by the sheriff's officer that the sheriff had received notice of an act of bankruptcy. Whether or no that was sufficient, Unwin had knowledge, independently, that Warner had absented himself, and the letter which he wrote to Pinchard & Shelton, on 25th November, shows what he thought of the matter. That letter amounts to this: "I fear it is now too late, for that an act of bankruptcy has been already committed."

CROMPTON, J.—On the last point made at the bar, I give no opinion. The case will be sufficiently decided upon the other points. There can be no doubt but that an act of bankruptcy was committed, and that Unwin had notice of it before the sale. This appears not only from the conversations between him and Brown and Clayton, but from all the surrounding circumstances, and Unwin's own letter. It *132] is immaterial whether the notice *was certain, if it was such (and I think it was) as should have led Unwin to make inquiry as to its truth. The remaining point is one of more difficulty, namely, whether Unwin was a proper person to whom to give the notice, so as to bind thereby the execution-creditor. The authorities, however, show that notice to the attorney employed in the cause by the execution-creditor is sufficient notice to the latter, and that (contrary to the general rule) such attorney may delegate his authority to receive the notice to his clerk, by giving the clerk a discretion how to act for him in the matter of the execution. Here, it was necessary for Briscoe's attorneys to appoint a sub-agent to act for them. They appointed Unwin in that capacity, and it is plain, from the terms of their letter of 24th November to him, in which they say, "If anything is to be done, it must be done quickly," that they gave him a discretion as to how he should act. That letter appears to me to have put him in the same position as if he had been the managing clerk of the writers. The notice given to him was therefore binding upon Briscoe.

Judgment for the plaintiffs.

*133]

*The QUEEN v. STORRAR. June 15.

Stat. 21 & 22 Vict. c. 90, s. 3, enacts that a Council, to be styled "The General Council of Medical Education and Registration of the United Kingdom," "shall be established." By sect. 4 this Council is to "consist of one person chosen from time to time by each of" several "bodies," including the University of London.

Held that, under the existing charter of that University, the right to elect its member of the General Medical Council is vested in its Senate, consisting of the Chancellor, Vice-Chancellor, and Fellows for the time being; not in the whole body incorporated as the University by the charter, namely, the Chancellor, Vice-Chancellor, Fellows, and Graduates.

THIS was an information in the nature of a quo warranto against

the defendant for exercising and usurping the office and franchise of a member of The General Council of Medical Education.

Plea. That the defendant was duly elected. Issue thereon.

The following case was stated, by order of Crompton, J., for the opinion of this Court:—

By stat. 21 & 22 Vict. c. 90, entitled "An Act to regulate the qualifications of practitioners in medicine and surgery," it was enacted, (a) amongst other things, that a Council, which should be styled "The General Council of Medical Education and Registration of the United Kingdom," thereafter referred to as the General Council, should be established, and (b) that the General Council should consist of one person chosen from time to time by each of the following bodies, that is to say, the Royal College of Physicians, the Royal College of Surgeons of England, the Apothecaries' Society of London, the University of Oxford, the University of Cambridge, the University of Durham, the University of London, and divers other bodies therein named, eighteen in all; and of six persons to be nominated by Her Majesty with the advice of her Privy Council, and of a *president, to be elected by the General Council; and (c) that [*134 the General Council should hold their first meeting within three months from the commencement of the said Act. Such meeting was, accordingly, duly held on 23d November, 1858, at the Hall of the Royal College of Physicians.

On 3d November, 1858, the Chancellor, Vice-Chancellor, and Fellows of the University of London, then being and acting as the Senate of the said University, in alleged pursuance of the said statute, proceeded to elect a member of the said General Council, and then elected the defendant John Storrar as the person to be, in pursuance of the said statute, elected by the University of London as a member of the said General Council; and he, the defendant, attended at the meeting of the said General Council on 23d November, 1858, and voted, and has since at other meetings of the General Council attended and voted, and still claims to attend and vote, as the person elected in pursuance of the said statute by the University of London.

The University of London was first constituted and regulated by a Royal charter of His late Majesty King William IV., dated 28th November, in the seventh year of His late Majesty's reign; and by it certain persons therein named, and all other persons whom His said Majesty might thereafter appoint to be Chancellor, Vice-Chancellor, or Fellows of the said University, were by him declared and constituted one body politic and corporate by the name of "The University of London," and that charter was accepted and acted upon by such persons. This charter was, by a Royal charter of Her present Majesty, bearing date 5th December, in the first *year of [*135 her reign, revoked, and Her said Majesty did, by her said charter, grant, declare, and constitute certain persons therein mentioned, and all the persons who might thereafter be appointed to be Chancellor, Vice-Chancellor, or Fellows, one body politic or corporate, by the name of "The University of London," with certain powers, which powers Her said Majesty did thereafter, by her Royal charter bearing date 7th July, in the thirteenth year of her reign, enlarge;

(a) Sect. 2.

(b) Sect. 4.

(c) Sect. 9.

which charters were accepted and acted upon by the persons therein mentioned. These last-mentioned charters were, by a Royal charter of Her present Majesty, bearing date 9th April, in the twenty-first year of her reign, duly revoked, and by the last-mentioned charter Her said Majesty did grant, declare, and constitute certain persons therein mentioned, and all persons who might thereafter be appointed to be Chancellor, Vice-Chancellor, or Fellows of the said University as therein mentioned, and all the persons on whom respectively the University created by the said charter of 5th December, in the first year of her reign, had conferred any of the degrees of Doctor of Laws, Doctor of Medicine, Master of Arts, Bachelor of Laws, Bachelor of Medicine, or Bachelor of Arts, and all the persons on whom respectively the University created by the said charter of 9th April might thereafter confer any of the said degrees, one body politic and corporate by the name of "The University of London," which charter was accepted by the said persons and acted on by them; and Her said Majesty did by her said charter further will and ordain, amongst other things, that the said body politic and corporate should consist of a Chancellor, Vice-Chancellor, Fellows, and Graduates, and that there *136] should be thirty-six Fellows, exclusive of the *Chancellor and Vice-Chancellor for the time being, and that the Fellows should be such persons as her Majesty did thereby appoint, or as she, her heirs and successors, should from time to time appoint, as Fellows, under her or their sign manual, and as should be appointed as Fellows under the power thereafter and hereinafter contained, and that the Graduates should be the persons on whom respectively the said University should confer any of the said degrees; and did further will and ordain, that the Chancellor, Vice-Chancellor, and Fellows for the time being should constitute the Senate of the said University, and that every second vacancy amongst the Fellows should be filled up by Her Majesty from a list of three persons, to be nominated by the Convocation of the said University, until nine of the Fellows should have been so selected, and that thereafter one out of every four new Fellows should be so selected; and that the Convocation should consist of all Graduates for the time being of the said University, except Bachelors of Laws and Medicine, of less than two years', and except Bachelors of Arts of less than three years' standing; and that the Chancellor, Vice-Chancellor, and Fellows for the time being should have the entire management of and superintendence over the affairs, concerns, and property of the said University; and that, in all cases unprovided for by the charter, it should be lawful for the Chancellor, Vice-Chancellor, and Fellows to act in such manner as should appear to them best calculated to promote the purposes intended by the University; and that the said Chancellor, Vice-Chancellor, and Fellows should have full power from time to time to make and alter any by-laws and regulations, so as the same were not repugnant to the laws *137] of the realm, or to the general objects and provisions *of the said charter, touching examinations for degrees, and the granting of degrees, and the meeting of the Senate, and the meetings of Convocation, and, in general, touching all matters and things regarding the University, not expressly provided for by the said charter; and that the Chancellor and Fellows for the time being should have

full power from time to time to appoint as they should see occasion; or to remove, all examining officers and servants of the said University; and that Convocation should have the power of nominating three persons for every Fellow to be appointed as aforesaid from a list nominated by Convocation for the purpose; of discussing any matter relating to the University, and of declaring the opinion of Convocation thereupon; of accepting any new charter, or consenting to the surrender of the present or of any new charter; of deciding upon the mode of conducting and registering the proceedings of Convocation; of appointing or removing a clerk of Convocation, and of prescribing his duties; and that, except as was therein expressly provided, the Convocation should not interfere in, or have any control over, the affairs of the University. And this charter has been duly accepted, and has been acted upon. The said Chancellor, Vice-Chancellor and Fellows have not made any by-law or regulation touching or relating to the election of a member of the said General Council. (The last-mentioned charter was to form part of the case.)

The question for the opinion of the Court was, Whether, under the charter and stat. 21 & 22 Vict. c. 90, the authority to choose such member is given to and vested in the Senate of the said University, or in the entire University, consisting of Chancellor, Vice-Chancellor Fellows, and Graduates thereof.

**Edward James, for the Crown.*(a)—The election of the defendant was invalid; for the franchise is vested in the entire University. Under the last charter, the Chancellor, Vice-Chancellor, Fellows, and Graduates constitute the University, and it is the University upon which stat. 21 & 22 Vict. c. 90, s. 4, confers the right to elect a member of the General Medical Council. The same charter makes the Senate of the University consist of the Chancellor, Vice-Chancellor, and Fellows, exclusively of the other Graduates; and defines the matters in which this Senate is to act for the whole University. The Senate is to "have the entire management of and superintendence over the affairs, concerns, and property of the said University," and is, "in all cases unprovided for by the charter," "to act in such manner as shall appear" to it "best calculated to promote the purposes intended by the University." The right to make this election, forms no part of "the affairs, concerns, and property" of the University, nor is it a "case unprovided for by the charter," words which relate only to any *casus omissus* in the charter, with respect to the management of the University itself, and its affairs; and which can have no reference to the case of a franchise conferred upon the University long subsequent to the granting of the charter. The expression, "The University," *prima facie* means the whole body of which the University consists. And, had the Legislature intended to confer this franchise on a part only of that body, they would not have used, without explanation, a phrase which implies the whole body. It may be said by the other side that, unless the Senate is to elect, there will be great *difficulty in carrying the Act into effect; because no means exist under the charter for getting the whole body of Graduates of the University together. But there would be the same difficulty as to the meetings of the Senate. The question must, however, be determined according

(a) Thursday, June 9th. Before Lord Campbell, C. J., Wightman and Erie, J.

to law, without reference to any alleged inconvenience which may result from the state of the law. If the charter is defective, application must be made to the Crown to remedy the defect; pending any such alteration, the University must put up with the charter as originally framed: *Rex v. Giniver*, 6 T. R. 732; *Rex v. Cutbush*, 4 Burr. 2204. If it be said that the charter impliedly empowers the Senate to make this election, by giving them power to elect officers and servants of the University, the answer is, that the persons whom the Senate is to elect are persons who are to act as agents for the Senate in the management of the internal affairs of the University; not as representatives, in another place, of the University at large. In *London City v. Vanacker*, 1 Ld. Raym. 496, 499, where it was held that every corporation can of common right make by-laws concerning its franchises, Lord Holt, C. J., says, "All franchises which are granted are upon condition that they should be duly executed, according to the charter that settles the constitution." So, in *Rex v. Westwood*, 7 Bing. 1, Parke, J., says,^(a) "It is a legal incident to every corporation to have the power of making by-laws, regulations, or ordinances, relative to the purposes for which such corporation is instituted; and that power is *prima facie* to be exercised by the body at large." And, in the same case, Littledale, J., observes,^(b) "If there *140] be *a general power given to a select body to make by-laws in all cases whatsoever, there can be no doubt but the right which is incident to the body at large is taken away." "But if the power given to the select body to make by-laws only extends to some particular cases, then it may be questioned whether the general power which the body at large has, is altogether taken away by the power given to the select body, or whether this is only an abridgment *pro tanto* of the power of the body at large, and so as that they retain their power in all cases, except in those where the select body have the power, and that that which is untouched of their power remains as it was. And, in my opinion, the power is only taken away in those cases to which the right of the select body extends." These dicta are authorities in favour of the contention, on behalf of the Crown, that, looking to the wording both of stat. 21 & 22 Vict. c. 90, s. 4, and of the charter of the University, the franchise in dispute is vested in the body at large of the University, not in the select body, the Senate.

Welshy, contra.—The Senate of the University was the proper body to make this election. The charter of the University now in force gives the Senate the most ample powers, to be exercised on behalf of the whole University. Thus, it empowers the Senate to make by-laws "touching examinations for degrees and the granting of degrees." Now, by "The University of London Medical Graduates Act, 1854," 17 & 18 Vict. c. 114, graduates in Medicine of the University are authorized to practise physic without undergoing any further examination. The provisions of this Act are continued in *141] force by the 53d section of stat. 21 & 22 Vict. c. 90. *As, therefore, the Senate has power to regulate the examinations for degrees in medicine, which degrees, when conferred, give the graduates an immediate right to practise physic, it is but reasonable

to hold that the Senate has also power to elect the representative of the University at the General Medical Council; the duties of which consist, inter alia, under stat. 21 & 22 Vict. c. 90, s. 18, in investigating the course of study and requisites necessary for obtaining degrees in medicine at, amongst other places, the University of London. Again, the Senate has, under the charter, "the entire management of and superintendence over the affairs, concerns, and property of the University," and may "in all cases unprovided for by the charter" "act in such manner" as they think will best promote the purposes of the University. Now the election of the representative of the University at the General Medical Council must either be a part of "the affairs" and "concerns" of the University, within the meaning of the charter, or it must be one of the "cases unprovided for by the charter." In either view, the election is to be made by the Senate. This construction of the charter is confirmed when its language with respect to the general body of the convocation of the University is looked at. For, after specifying the matters in which the convocation is to act (in which, of course, the exercise of the present franchise is not included), it declares that, except as is therein expressly provided, the convocation shall not interfere in, or have any control over, the affairs of the University.

Edward James was heard in reply.

Cur. adv. vult.

*Lord CAMPBELL, C. J., now delivered the judgment of the Court. [*142

The question which we have to determine in this case is whether the defendant has been duly elected by the University of London a member of the General Council of Medical Education of the United Kingdom, under stat. 21 & 22 Vict. c. 90. This statute enacts that this General Council shall consist of one person chosen from time to time by each of certain specified bodies politic, amongst whom is the University of London. On 3d November, 1858, the defendant was elected a member of this General Council by the Chancellor, Vice-Chancellor, and Fellows of the University of London, as the Senate of the said University, and he has since acted as a member of the Council. On the part of the relator it is contended that the election of a member of this Council by the University of London cannot be made by the Senate, but must be made by all the persons enumerated in sect. 3 of the last charter granted to the University, comprehending all the Graduates of the University. As the right of election is by the statute given to "The University of London;" and as the charter, by sect. 3, constitutes certain individuals therein designated, and all the persons on whom the University had conferred degrees, and all the persons on whom the University shall thereafter confer degrees, one body politic and corporate, by the name of "The University of London;" and as sect. 4 of the charter ordains, "that the said body politic and corporate shall consist of a Chancellor, Vice-Chancellor, Fellows, and Graduates;" if nothing to the contrary appeared in the charter, there would seem strong ground for contending that the election in *question should be made by all those [*143 who are ordained by the charter to constitute the University, and therefore that all Graduates of the University ought to have a voice in the election. But regard must be had to sect. 8, which or-

dains "that the Chancellor, Vice-Chancellor, and Fellows for the time being shall constitute the Senate of the University," and to sect. 18, which ordains "that the Chancellor, Vice-Chancellor, and Fellows for the time being shall have the entire management of, and superintendence over, the affairs, concerns, and property of the said University; and in all cases unprovided for by the charter it shall be lawful for the Chancellor, Vice-Chancellor, and Fellows to act in such manner as shall appear to them best calculated to promote the purposes intended by the University." Now, this election of a member of the Medical Council is a case unprovided for by the charter, and it seems to come within the scope of the affairs and concerns of the University, of and over which it is ordained that the Senate shall have the entire management and superintendence. If so, the members of the Senate ought to choose the member of the Medical Board; acting in such manner as shall appear to them best calculated to promote the object in view. However it might have been if an Act of Parliament had conferred upon the University of London the right of electing a member of the House of Commons, without more distinctly defining the franchise, it can hardly be supposed that it was the intention of the Legislature that all the Doctors of Laws, Doctors of Medicine, Masters of Arts, Bachelors of Laws, Bachelors of Medicine, and Bachelors of Arts, who may be Graduates of the University of London, should be assembled to choose this member of the Medical Board; a choice in which the great bulk of *them are likely *144] to take no interest, and which must be made more conveniently and more discreetly by the Chancellor, Vice-Chancellor, and Fellows, constituting the Senate. For these reasons, we think that the election in question by the Senate was valid, and that we are bound to give judgment for the defendant. Judgment for the defendant.

PETO and Others, Appellants, v. The Churchwardens and Overseers of the Parish of WESTHAM, Respondents. June 15.

By The General Lighting and Watching Act, 3 & 4 W. 4, c. 90, s. 33, "owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any" "parish," are to be rated at "a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated." By sect. 34, "every court-yard, yard, or garden (such garden not being a market garden or nursery ground) shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively attached."

The Victoria London Docks cover an area of 165 acres, 95 of which form a wet dock, tidal basin and canal, all covered with water; the remaining area consists of jetties which intersect the wet dock and basin, and of warehouses and buildings on the jetties. The whole forms one enclosure, occupied by appellants; who make different charges for the use of the wet dock and basin, and for the use of the warehouses and buildings. The whole area is lighted and watched at appellants' sole expense.

In a watching and lighting rate, imposed under the above Act, appellants were rated, in respect of the whole area, at a rate in the pound thrice greater than that at which the occupiers of land were rated.

On an appeal, in respect of the ninety-five acres, from a decision of Sessions confirming the rate: Held, by Lord Campbell, C. J., Wightman and Crompton, Js., that appellants were rateable at the higher rate in respect of the ninety-five acres; for that such acres were "property other than land," and ejusdem generis with houses and buildings.

Held, by Erie, J., that appellants were rateable at the lower rate; for that the ninety-five acres were "land."

UPON appeal to the Essex Quarter Sessions, on 19th October, 1858, against a lighting and watching rate, the Sessions confirmed the rate, subject to the opinion of this Court upon a case, which was substantially as follows.

The appellants are lessees and occupiers of The Victoria London Docks, situate in the ward of Plaistow, *in the parish of West Ham, Essex. The General Lighting and Watching Act, 3 & 4 W. 4, c. 90, has been adopted in the said ward. The docks in question are built in the usual manner, and surrounded by banks and quays used in loading and unloading the ships that enter them. The supply of water is derived from the Thames, which flows into the dock basins through the flood and lock gates in the assessment hereinafter mentioned. These docks are leased to the appellants by The Victoria Docks Company, who constructed them under the powers of The Victoria London Dock Act, 1850,(a) and the Victoria London Dock Act, 1853.(b) The property is rateable to the poor in the said parish, and was and is assessed to the poor-rate for the said parish as follows. [The case here set out an extract from the rate-book, which showed land amounting to 165 acres, 3 roods, 24 perches, the rateable value being 12,500*l.*, and the rate being 937*l.* 10*s.*] Of the area of 165 acres, 3 roods, 24 perches, thus assessed, 95 acres form a wet dock, or tidal basin, connected with the river Thames by a lock and canal, and always covered with water, being below low-water mark. Ships entering the docks and using the wet-docks or tidal basin pay a certain and defined rate per ton for the water accommodation. Charges on a different basis are levied for the use of the warehouses and buildings. The accounts of the money accruing from the above-mentioned sources of income are kept distinct.

The appellants, as such lessees and occupiers, have been assessed by the churchwardens and overseers of the poor of the said parish, for the purposes of The *Lighting and Watching Act, 3 & 4 W. 4, c. 90, in the words and figures following: "An assessment for lighting that part of the parish of West Ham, Essex, commonly known as the ward of Plaistow, made," &c., "after the rate of 2½*d.* in the pound upon land, and after the rate of 6½*d.* upon houses, buildings, and other property situate in the ward of Plaistow; pursuant to the statute 3 & 4 W. 4, c. 90;" in which rate the appellants were assessed as follows. [The case here set out an extract from the rate-book, in which the quantity of land and the rateable value were the same as in the extract from the poor-rate book; and the amount of the rate at 6½*d.* was stated to be 351*l.* 11*s.* 3*d.* It also referred to a plan, which accompanied and was to form part of the case.] The sections of the last named Act which are applicable to the questions raised are the 32*d.*, 33*d.*, and 34*th.*

Sect. 32. "That as soon as the inspectors have been elected as aforesaid, it shall be lawful for them, or any two or more of them, from time to time to issue an order under their hands to the overseers of the poor of any parish to which the provisions of this Act shall be extended, by which order they shall require the said overseers to levy the amount mentioned in the said order."

(a) 13 & 14 Vict. c. 11. Local and personal, public.

(b) 16 & 17 Vict. c. cxxxi. Local and personal, public.

Sect. 33. "That the overseers aforesaid shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor in the said parish: Provided always, that owners and occupiers of houses, buildings, and property (other than land) rateable to the *147] relief of the poor in any such *parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at^(a) and pay for the purposes of this Act: Provided also, that the total amount of the sum to be collected, raised, and levied for the purposes of this Act within any one year shall not exceed such sum as shall have been agreed on by the inhabitants of the said parish as aforesaid, and that the said sum shall be assessed upon the full and fair annual value to which lands, houses, buildings, and other property within the said parish shall be rated or shall be rateable according to the last valuation made and acted upon for the rate for the relief of the poor within the said parish."

Sect. 34. "Provided always, and be it further enacted, that it shall be lawful for the overseers of the poor of any such parish, and they are hereby required, whenever, according to the rate made for the relief of the poor, one and the same person shall be rated in one sum in respect of land, and also of houses, buildings, and other property, to cause such land, and also such houses, buildings, and other property, to be separately assessed, and the sum hereby authorized to be levied shall be assessed accordingly: Provided always, that every court-yard, yard, or garden (such garden not being a market garden or nursery ground) shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively attached: Provided also, that such land, houses, buildings, and other property shall not in the whole be assessed at a *148] higher amount than they were in the last *rate made for the relief of the poor within the said parish."

There are no public lamps within the area rated as above, but all necessary lamps are maintained at the expense of the appellants, and the premises are watched by policemen appointed and paid by the appellants. The cost to them of the lighting and watching is upwards of 3000*l.* a year. The docks are closed for traffic daily at 7 p. m. during the winter, and at 8 p. m. during the summer months.

The appellants contended that, under the 34th section, the said wet dock, tidal basin, and canal ought to have been rated as land at 2½*d.* in the pound, being a sum three times less than that at which the said buildings and other premises were rated.

The Sessions decided that the appellants were properly rated at the higher rate, and confirmed the rate, subject to the opinion of this Court. If the Court should be of opinion that the Sessions were correct, then the said rate was to be confirmed. If the Court should be of a contrary opinion, then it was agreed that the said rate should be amended by assessing, for the purposes of this case, the said wet dock, tidal basin, and canal at the sum of 2½*d.* in the pound on the

sum of 6250*l.*, and the residue of the said premises at the sum of 6*½d.* in the pound on the sum of 6250*l.*

Tindal Atkinson and Murphy, in support of the order of Sessions.(a)—The appellants were properly rated at the higher rate. The question turns upon the construction of stat. 3 & 4 W. 4, c. 90, s. 33. The appellants contend that the wet-dock, tidal basin, and canal are not "property other than land" within the meaning of that [*149] section, but that they are "land." The description "land," however, has been held by this Court, in *Regina v. Midland Railway Co.*, 4 E. & B. 958 (E. C. L. R. vol. 82), not to apply to land which has been taken out of agricultural occupation, and beneficially occupied for purposes of commerce. In the judgment in that case, the Court says,(b) speaking of the exception of "land" from rateability, contained in the statute there in question: "Reading the two clauses together, as comprehending all real property, we think that the exemption extends only to land used for the purposes of agriculture, or gardening, or any kind of mere vegetation, together with the roads and other matters that are ancillary to those purposes; and that hereditaments in which capital has been invested for habitation, or for purposes of profit, from manufacturing or mechanical industry, are to be rated." [ERLE, J.—Was the language of that statute the same as that of stat. 3 & 4 W. 4, c. 90, s. 33?] It was not; but the test suggested by the Court is equally applicable to ascertaining the meaning of "land" in the latter statute. So applying it, this dock, basin, and canal must be held to be "property other than land," and to be property ejusdem generis with the "houses" and "buildings" mentioned just before in sect. 33. Again, by sect. 34, it is provided "that every court-yard, yard, or garden (such garden not being a market garden or a nursery ground) shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively *attached." The whole area of these docks is [*150] nothing more than a large court-yard ancillary to the warehouses, which are enclosed within the same common wall with them. [CROMPTON, J.—I should have thought that the warehouses were ancillary to the docks, not the docks to the warehouses.] The substantial question, no doubt, is, what is the meaning of "land" in sect. 33. The word must clearly be used there in a limited sense, as a distinction is drawn between it and "houses" and "buildings," which, in its general and widest sense, it would include. *Regina v. Midland Railway Company*, 4 E. & B. 958, shows that the limited sense intended must be that of land in occupation for agricultural purposes. [ERLE, J.—The gist of the judgment in that case was that the railway was a "work" within the meaning of the word "works" in the Act there in question, and so was rateable.] But the passage in the judgment, which has been cited, is an authority as to the meaning of "land" also. *Regina v. Southwark and Vauxhall Water Company*, 6 E. & B. 1008 (E. C. L. R. vol. 88), may be relied upon by the other side. There the Company were held to be rateable to a lighting-rate on the lower scale, as occupiers of land, in respect of their mains and pipes passing

(a) Wednesday, June 1st. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.

(b) At p. 962.

under the soil of the public highways of the parish in which they were rated. That case is, however, distinguishable on the ground that the Company had no works in the parish, and owned no property therein except the mains and pipes. They therefore occupied the land through which the mains and pipes passed simply as land, and not as property other than land. Moreover, the small portion of *151] land which they thus occupied could not, from its *nature, derive any advantage from the watching and lighting: whereas, here, the appellants' docks and basins, especially considering their size and extent, must be greatly benefited and protected by the different approaches to them being lighted and watched at the expense of the rate.

Bovill, for the appellants.—In reality, the area of these docks is land covered with water. They are not ancillary to the warehouses, as suggested by the other side, but altogether distinct from them. The object of The Lighting and Watching Act was to effect an equitable adjustment of the rate upon different kinds of property. Sect. 33, after providing that the rate shall be levied upon the same principle as the poor-rate, proceeds to distinguish between different kinds of property, which are to be rated at different amounts in the pound. Then sect. 34 provides for the separate assessment of "land," and of "houses, buildings, and other property," by which must be meant property ejusdem generis with houses and buildings. The same sense is to be given to the word "property" in sect. 33. [ERLE, J.—It is quite clear that a court-yard would have been "land," unless it had been specially classed with houses and buildings by the proviso to sect. 34.] No doubt: and the two sections must be read together. In neither is there any special provision, such as to take property of the description of these docks out of the ordinary definition of land covered with water, which, in the absence of any such provision, must apply to them. *Regina v. Southwark and Vauxhall Water Company*, *152] 6 E. & B. 1008 (E. C. L. R. vol. 88), is conclusive *in favour of the appellants. That case virtually decides that small reservoirs (for conduit-pipes are nothing else) are land. If so, any reservoir, whatever its size, is equally land: the size can make no difference in point of law. In *Rex v. The Corporation of Bath*, 14 East 609, 618, it was decided that a reservoir is land, and Lord Ellenborough said, "I confess I have great difficulty in distinguishing between the case of water collected in a trunk or reservoir so many yards wide, or in pipes so many inches wide, each being attached to the soil." And he adhered to that opinion in the subsequent case of *Rex v. Rochdale Company*, 1 M. & S. 634 (E. C. L. R. vol. 28). Lastly, the appellants ought to be exempted from payment of the higher rate, in respect of the land covered with water, on the general ground that the profits which they derive from this part of their property are not immediately connected with the benefits derived from watching and lighting: *Howell v. London Dock Company*, 8 E. & B. 212 (E. C. L. R. vol. 92). *Cur. adv. vult.*

The Judges differing in opinion, the following judgments were now delivered:—

ERLE, J.—This case turns upon the construction of sect. 33 of stat. 3 & 4 W. 4, c. 90, directing the rate for lighting and watching to be

the same as the poor-rate; except that the rate on houses, buildings, and property other than land, is to be three times greater than the rate on land. The appellants, lessees of the Victoria London Docks, admit that all houses and buildings whatsoever, such as warehouses, wharfs, and locks, are to be rated at the *higher rate; but they [*153 contend that the area of the dock, being mere land covered with water, used for the passage and the floating of ships, amounting to 95 acres out of 165, ought to be rated at the lower rate, as land. In answering the question thus raised, we must consider the words of the enactment describing the two classes of property, and the purpose for which the two classes were made. All rateable property is included under the term "land," and land is here divided into two classes; the one consisting of houses, buildings, and property of that sort, the other consisting of all land not included in the first-named class. The general rule is well known, that specific words, when followed by wider terms, restrict the extension of those terms. According to this rule of construction, the class of property subjected to the higher rate is confined to houses and buildings, and other property of the same sort as houses and buildings; and this stands decided in *The Queen v. Southwark and Vauxhall Water Company*, 6 E. & B. 1008 (E. C. L. R. vol. 88). If we refer to the purpose of the enactment, the increase of charge must be intended to be in proportion to the benefit derived. The charge, here, is the price for lighting and watching, which is a need created by dense habitation, and for which the Legislature has repeatedly made provision, treating it as an incident to towns. Thus, in local Acts for the improvement of particular towns, in the Metropolis Local Management Act, and in The Municipal Corporations Act, the charge for lighting and watching is imposed by various descriptions on the locality frequented by numerous inhabitants; where light is required in respect of personal passage, and watchmen are required for keeping *good order. By the [*154 Plymouth Local Act, the charge was on the populous or town part of the borough; which was further described to be within 100 feet of the end of a continuous row of houses. See *Plymouth General District Rate*, E. B. & E. 691 (E. C. L. R. vol. 96). In The Municipal Corporations Act, no part of the borough shall be included in the watch-rate, which is more than 200 yards from a street or line of houses regularly watched. See *Hallett v. Overseers of Brighton*, 7 E. & B. 342 (E. C. L. R. vol. 90). In The Metropolis Local Management Act the words are the same as in the statute now in question. This construction of sect. 33 of stat. 3 & 4 W. 4, c. 90, is made more clear by sect. 34, giving the ratepayer rated for land, and for houses, buildings, and property other than land, in one sum, a right to require that each class of property should be separately assessed; and providing that court-yards, yards and gardens, other than market-gardens or nursery-grounds, shall be in the same class as the houses and buildings to which they are attached. The Legislature implies, by this section, that all landed property where the surface is free from any houses or buildings thereon, was presumed to be in the class of land; for it provides that land, although so circumstanced, still, if it is a court-yard, yard, or garden attached to a house, shall be excepted out of the class land, and taken into the class of houses; while all other

land, with a surface free from house or buildings thereon, remains in the class land. By this section, the yards that are classed with houses are in the nature of curtilages; and, as they alone are specified, it seems clear that timber-yards and the like, where the surface is used merely for store, and which *are in no way attached to any dwelling, ought not to be so classed. According to this construction, the property in question is in the class of land, and not in the class of houses, buildings, and the like. It is a water-way for ships to come to the warehouses and jetties, and resembles a private way for carriages through fields to a house. The ships pass through the lock and canal to the basin, where they would lie on the mud at low tide, as usual in tidal harbours, if the water was not retained by the lock; such mud being clearly mere land, though used by ships. The lock is rated as a building, because it is masonry: but it seems unreasonable to say that mud approximates in any sense to a building, because it is covered with water. If the principle of charging in proportion to the benefit be applied, then, according to the facts of the case, the property in question derives absolutely no benefit at all. It was contended that land meant only land used for agriculture, and that houses, buildings, and other property of that sort meant all land in which capital had been invested for any other purpose than agriculture. But such a construction is not supported by any words, nor by the context. Where the Legislature so intended, the intention was expressed; as in The Metropolis Local Management Act, 18 & 19 Vict. c. 120, the 163d section of which, relating to the sewers' rate, defines land to be "all land used as arable, meadow, or pasture ground only, or as woodland, orchard, market-garden, hop, herb, flower, fruit, or nursery ground;" but sect. 165 divides the rateable property into the two classes of buildings and land, without that restriction to agricultural land. *Regina v. Southwark and Vauxhall Water Company*, 6 E. & B. 1008 (E. C. L. R. vol. 88), decides that land in which capital has been invested for commercial *profit, entirely exclusive of agriculture, is to be rated in the class land, and not in the class buildings. There the capital was in water-pipes used under the land; and the decision and the reason thereof are in point for the appellants in this case, there being no distinction between water confined in pipes for household purposes, and water confined by lock-gates for shipping purposes, each being equally far from agriculture. Also, the decision in *Regina v. Midland Railway Company*, 4 E. & B. 958 (E. C. L. R. vol. 82), is in point for the appellants. For a railway was held rateable under the statute there in question, where the rate was imposed on houses, warehouses, shops, cellars, vaults, &c., and all buildings, erections, works, tenements and hereditaments, except houses under 5*l.* annual value, and land. The Court held a railway rateable only because "works" were mentioned, and the judgment is, in effect, that but for that word it would be land, and so not be rateable under that statute. In the present statute there is no such word as "works," and this case also is therefore, by implication, an authority in favour of the appellants.

Upon the words, and the context, and the authorities, I think judgment should be for the appellants.

Lord CAMPBELL, C. J., delivered the judgment of himself, and of Wightman and Crompton, Js.:—

I am of opinion that in this case the Sessions came to a right conclusion. The whole of the premises in respect of which the appellants were assessed at the sum of 351*l.* 11*s.* 3*d.* to the rate in question, appear to me to be “property other than land” within the meaning of sect. 33 of stat. 3 & 4 W. 4, c. 90. From the plan, which is to be taken as part of the case, it appears that The *Victoria London Docks, constructed under the powers of two local Acts of Par- [*157liament, consist of one great commercial establishment, occupying an area of 165 acres, surrounded by a wall. Of this area, 95 acres are now usually covered with water, forming two basins for the reception of merchant ships, the one called the “Tidal Basin” and the other the “Inner Dock;” but both have been excavated for this purpose, and are beneath the level of the adjoining river Thames at low water. They are surrounded by stone walls, and intersected by a great number of jetties, which run to the centre of the space covered by water; with warehouses and cranes on the sides and extremities of these jetties. The cargoes of the ships lying in the dock and basin are landed at these jetties and deposited in these warehouses. I am of opinion that the dock and the basin are property ejusdem generis as the “houses and buildings.” The dock and basin may, no doubt, in one sense of the word, be considered “land,” and they would well pass by deed or will by the description of “land covered with water.” But, in the enactment to be construed, the Legislature appears to have intended to divide land into two classes: one, where capital is invested in it for commercial purposes; and the other, where it remains in its natural state, or is cultivated for agricultural purposes. Generally, speaking, the first class might be expected to derive much greater advantages from lighting and watching than the second, and therefore it is to be assessed at a higher rate. The 34th section of stat. 3 & 4 W. 4, c. 90, respecting “gardens,” seems to show clearly the intention of the Legislature that what is accessory to “houses and buildings” should come within the same category, and that the other category should only *comprehend land used for agricultural [*158purposes. When I look at the subject-matter rated here, I do not see how the dock and basin are to be separated from the jetties and warehouses. The dock and basin would be useless without the jetties and warehouses, and the jetties and warehouses would be useless without the dock and basin. They all form one undertaking and one establishment. There is no doubt that a large capital must have been laid out in excavating and puddling the dock and basin, and surrounding them with walls. If they had been used for carrying on a manufactory, without any buildings being erected upon them, and without water being introduced into them, they could not possibly have been considered “land” within the meaning of this section of the Act of Parliament; and can it make any difference that, instead of their being paved and goods being deposited upon them, water is introduced into them, which supports floating warehouses, in which the goods are stowed? This is the view we took of a similar enactment in a local Act, in *Regina v. Midland Railway Company*, 4 E. & B. 958 (E. C. L. R. vol. 82), where we held that the word “land,” so

used, must mean land occupied for cultivation, and could not include land used for a line of railway, although there was no building upon it, nor anything beyond a rod of iron. The case of *Regina v. Southwark and Vauxhall Water Company*, 6 E. & B. 1008 (E. C. L. R. vol. 88), was much relied upon by the learned counsel for the appellants. When the facts of that case and the ratio decidendi are examined, it will be found not at all to be at variance with the doctrine which I now propound. Certain conduit mains and pipes belonging to a water

*159] Company passed under the soil of the highways in the parish of Putney, and it was expressly found that "the Company had no works in the parish." They were, therefore, to be considered as the occupiers of the land on which the pipes lay. Coleridge, J., said: "Seeing that the appellants would be rateable only as occupiers of land, they are clearly not to be rated at the higher rate." Wightman, J., said: "Pipes are not rateable per se, but only because the owner by them occupies land. So, being an occupier of land," "he is liable to the lower rate." Erle, J., said: "Pipes are not houses, or property of that kind;" and Lord Campbell, C. J., said: "The appellants are not rated as being occupiers of pipes: they are rated as being occupiers of the land which they occupy by means of those pipes." In this case the property in the basin and dock may derive material benefit from the approaches to the establishment being lighted, at the expense of the rate; and it must be greatly protected by the watchmen who are appointed by the Commissioners to guard it. I have only further to add that the size of the dock and basin, so much dwelt upon, seems to me to be quite immaterial; and that this attempt to separate the part of the establishment which, for the purposes of the establishment, is covered with water, from the rest of the works, cannot succeed unless the appellants could have supported a claim to be rated on the lower scale for half a rood of land used within the enclosure as a reservoir for water to supply the boiler of a steam-engine, which aids the operations going on in the establishment. For these reasons, I am of opinion, with my brothers Wightman and Crompton, that we ought to give judgment for the respondents.

Judgment for the respondents.

*160] *LOZANO and Others v. JANSON. June 16.

Plaintiffs, merchants in London, as agents for F., a Brazilian subject residing at Loanda, chartered the British ship *Newport* to carry a cargo of goods on behalf of F. from London to Ambriz or Loanda, on the coast of Africa, and to reload there a homeward cargo of African produce for London. They afterwards, on 9th June, 1854, on F.'s behalf, insured the *Newport's* outward cargo at and from London to Ambriz or Loanda, by a policy underwritten by defendant. The perils insured against were, inter alia, "takings at sea, arrests, restraints and detentions of all kinds, princes, and people, of what nature, condition, or quality soever." In June, 1854, the *Newport* sailed with this cargo, consigned to F. at Loanda. On 21st September, 1854, while on the voyage out, she was seized, near Ambriz, by a Queen's ship, under stat. 5 G. 4, c. 113, s. 4, for being illegally engaged in the slave trade; and was sent, with the cargo, to St. Helena for adjudication. On 16th October, 1854, ex parte proceedings were instituted in the Vice-Admiralty Court at St. Helena, which Court, on 20th November, 1854, condemned the ship to be forfeited; and, under sect. 7 of the statute, condemned plaintiffs, as shippers of the cargo,

in penalties amounting to double the value of the goods, and in costs; and ordered the goods to be held in deposit till payment of the penalties and costs. The ship was sold under order of the Court; as was a portion of the goods, being perishable, in December, 1854. The residue of the goods were detained, in specie, at St. Helena, by the Court. As soon as the proceedings at St. Helena were known in England, notice of abandonment was given to the underwriters on 13th December, 1854, being in due time. At that time the decree of the Court at St. Helena was not known in England. An appeal to the Queen in council against this decree was lodged on 31st January, 1855. Pending the appeal, possession of such of the goods as remained in specie at St. Helena could not be obtained until December, 1856; and then only on the terms of giving security for the invoice cost, without regard to depreciation in value. On 3d February, 1858, the Privy Council gave judgment, reversing the decree of the Court below, and ordering restitution of the ship to her owners; and of the goods still unsold, and the proceeds of the goods sold, to F. On 6th July, 1858, plaintiffs, on F.'s behalf, brought the present action against defendant on the policy, claiming as for a total loss of the cargo. At that time the goods still remaining in specie and unsold at St. Helena had deteriorated in value; but could have been forwarded thence to Loanda at a price less than their value when delivered there.

On a case stated, in which power was reserved to the Court to draw inferences of fact:

Held, first, that the seizure by the Queen's ship of the Newport with the goods insured on board, being wrongful, was a loss of the goods by a peril insured against.

Held, secondly, that the wrongful seizure and the notice of abandonment made the loss total; and that it was still total at the time of action brought; the Court drawing the inference of fact that F., as a prudent man, could not then be reasonably expected to take possession of the unsold goods at St. Helena.

DECLARATION on a policy of marine insurance, lost or not lost, at and from London to Ambriz and or Loanda, or port or ports on the coast of Africa, with leave to call and stay, and proceed backwards and forwards in any rotation, with all risk of craft, on goods on the ship Newport, valued at 7000*l.*; the insurance being against the usual perils. Averment, that defendant underwrote the policy for 150*l.*; that the risk attached, *and, during it, the goods were totally [*161 lost by perils insured against. Averment of interest in plaintiffs and one Francisco Antonio Flores. Breach, non-payment of defendant's subscription. There was also a second count, for money payable by defendant to plaintiffs, for money had and received, and on accounts stated.

Pleas. 1. To first count: Denial that the goods, or any of them, were lost by perils insured against. Issue thereon. 2. To second count: Never indebted. Issue thereon.

After pleading and before trial a case was stated, under an order of Erle, J., as follows:—

The plaintiffs constitute the firm of Pinto, Perez & Co., merchants, in London. The defendant is an underwriter for 150*l.* on a policy of insurance, a copy of which accompanies this case, and may be referred to by either party as part of it. By this policy, dated 9th June, 1854, Pinto, Perez & Co. made insurance on the Newport, at and from London to Ambriz and or Loanda, or port or ports on the coast of Africa, with leave to call and stay and proceed backwards and forwards, in any rotation, with all risk of craft. The subject of insurance was, in the valuation clause, declared to be "goods valued at 7000*l.* To pay average on each package, and or as customary, and general average per foreign statement." The policy was in the usual printed form of Lombard-Street policy, containing the usual clause, "Touching the adventure and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests,

restraints and detainments of all kings, princes, and people, of what
 *162] nation, condition, *or quality soever, barratry of the master
 and mariners, and of all other perils, losses, and misfortunes
 that have or shall come to the hurt, detriment, or damage of the said
 goods and merchandise, and ship, &c., or any part thereof. And in
 case of any loss or misfortune, it shall be lawful for the assured, their
 factors, servants, and assigns, to sue, labour, and travel, for, in, and
 about the defence, safeguard, and recovery of the said goods and mer-
 chandises, and ship, &c., or any part thereof, without prejudice to this,
 insurance, to the charges whereof we, the assurers, will contribute,
 each one according to the rate and quantity of his sum herein as-
 sured." The person to protect whose interest this assurance was made
 was Francisco Antonio Flores, who is a Brazilian subject, then resi-
 dent at Loanda, in the Portuguese territories on the coast of Africa,
 and there trading as a merchant. In April, 1854, Pinto, Perez & Co.,
 as agents for Flores, chartered the ship Newport, a British vessel,
 belonging to Messrs. Le Sueur, of Jersey, to carry a cargo of lawful
 goods to Ambriz or Loanda, and to reload at either or both of those
 places a homeward cargo of African produce, with which she was to
 return direct to London. Pinto, Perez & Co. purchased and shipped
 an outward cargo, by order, and on account, and at the risk of Flores;
 the invoice cost of which was 6457*l.* 18*s.* 9*d.*: with this cargo the
 Newport sailed, in June, 1854, consigned to Flores, at Loanda. The
 policy on which the action was brought was made by Pinto, Perez
 & Co., on account of Flores, to protect this cargo. The Newport, on
 21st September, 1854, whilst on the voyage in the policy mentioned,
 and with that cargo on board, was boarded, when near Ambriz, by an
 officer belonging to Her Majesty's ship Philomel, and was soon after-
 *163] wards seized by Captain Skeene, the commander of *the Philo-
 mel, for being, as he alleged, engaged in the slave trade. Captain
 Skeene removed part of the crew of the Newport into his
 own ship, and put on board three of his own men, under the com-
 mand of Lieutenant De Robeck, and ordered the ship, with her cargo
 on board, to be taken to St. Helena, under the command of Lieuten-
 ant De Robeck, with the master and the rest of the crew on board
 under detention. The ship and cargo were accordingly taken there.
 On the passage, she was kept for twenty-four hours off Loanda, where
 Flores was residing. The master of the Newport requested permis-
 sion to communicate with his consignee, but this was refused; and no
 notice of the seizure was given to Flores by the captors. The ship
 arrived at St. Helena on 8th October, 1854; and on 16th October,
 1854, proceedings were instituted in the Vice-Admiralty Court of St.
 Helena. No notice was given either to Flores, or to Pinto, Perez &
 Co. or to Le Sueur & Co., of the proceedings in the Admiralty Court
 of St. Helena. Flores executed, at Loanda, a power of attorney in
 the Portuguese language. (A translation of this instrument accom-
 panied the case. The original was executed, registered, and certified
 as the copy purported.) The master of the Newport made what de-
 fence he could for his owners, Le Sueur & Co., and also, though with-
 out authority from them, for his charterers, Pinto, Perez & Co.; but,
 except in so far as he intervened, the proceedings were entirely *ex*
parte. On these proceedings, the Judge of the Vice-Admiralty Court,

on 20th November, 1854, pronounced the brigantine Newport to have been engaged in the slave trade at the time of the seizure thereof; condemned her to be forfeited, and also condemned Pinto, Perez & Co., as the shippers and owners of the *goods, in penalties of [*164 12,915*l.* 17*s.* 6*d.*, being twice the value of the goods, and in costs, under the 7th section of stat. 5 G. 4, c. 113; and ordered that the goods should be held in deposit until the penalty and costs should be paid. The ship was shortly afterwards sold, under the order of the Vice-Admiralty Court of St. Helena. A portion of the goods was, under the decree of the Vice-Admiralty Court there, sold by the marshal in December, 1854, as being perishable goods. The residue of the cargo was landed and detained in St. Helena, in the custody of the Vice-Admiralty Court; and possession of this portion of the cargo could not be obtained until an appeal was instituted in the Privy Council, as after mentioned. During the pending of the appeal in the Privy Council, an application for time was made by the Queen's proctor on 29th November, 1856; and their Lordships then observed that, under the circumstances, no reasonable proposition for bailing the cargo should be refused. On 1st December, 1856, the proctor for Messrs. Perez proposed to have the cargo then appraised, and to give bail for its value. The Queen's proctor, on 1st January, 1857, refused, and required that bail should be given for 7457*l.* 18*s.* 9*d.*, namely, the invoice price of the cargo and 1000*l.* for costs. Afterwards, on 13th January, 1857, the Queen's proctor offered to accept bail for the invoice value of the cargo, but refused to accept bail for the value of the cargo as appraised at the time. Till December, 1856, possession of the cargo could not have been obtained on any terms, and then it could be obtained only on the terms of giving security for the invoice cost, without regard to the depreciation in value after the result of the appeal to the Judicial Committee of the Privy Council hereafter mentioned. As soon as the *proceedings, [but [*165 before the decree of the Court,(a)] in St. Helena became known in England, formal notice of abandonment was, without delay, and in due time, given to the underwriters, on 13th December, 1854. An appeal to the Queen in council was, on 31st January, 1855, lodged against the proceedings in the Vice-Admiralty Court of St. Helena, and was referred in the usual way to the Judicial Committee of the Privy Council. Pinto, Perez & Co. obtained leave to intervene for their own interest, and José Maria Perez, one of the plaintiffs, acting under the said power of attorney from Flores, also obtained leave to intervene for the interest of Flores, and on behalf of Flores made a claim, of which the following is a copy:—

“The claim of José Maria Perez, of Crutched Friars, in the city of London, merchant, a partner in the house trading under the firm of Pinto, Perez & Company, subjects of Great Britain, on behalf of Francisco Antonio Flores, merchant, a Brazilian subject, and carrying on lawful trade at St. Paul's de Loanda, within the territories of the King of Portugal, on the western coast of Africa, the legal and sole owner of the cargo which was laden on board the above-named brigantine or vessel Newport, whereof Charles Phillippe Hocquard

(a) The statement in brackets was not part of the case; but is given as a fact in the judgment of Lord Campbell, G. J., p. 176, l. 23.

was master at the time of the seizure thereof by John M'Dowell Skeene, Esq., the commander of Her Majesty's sloop of war Philomel, and taken to St. Helena: for the said cargo and for all such costs, charges, losses, damages, detriments, demurrages, and expenses as have arisen or which shall or may arise, or be sustained, by reason of the aforesaid seizure, and the detention of the said cargo.

"JOSÉ M. PEREZ."

*166] *The judgment of the Judicial Committee was delivered on 3d February, 1858, reversing altogether the sentence of the Court below, and ordering a restitution of the ship to Le Sueur & Co., with costs and damages, and a restitution to Flores of the cargo and of the proceeds of such part as had been sold, but without costs or damages. The grounds on which the Judicial Committee gave their judgment appear from the judgment delivered (a printed copy of which accompanied and was to be taken as part of the case, and might be referred to by either party), and the facts stated in that judgment are admitted to be correct.(a) At the time when this judgment was pronounced, a portion of the cargo had been sold in St. Helena as perishable goods. The proceeds, amounting to £11. 9s. 7d., were in the custody of the Vice-Admiralty Court. The residue of the cargo was still at St. Helena, in the custody of the Vice-Admiralty Court, existing in specie, but deteriorated in value; where it now remains.

It was to be taken as admitted, for the purpose of obtaining the judgment of the Court, but not as an admission before the arbitrator, that it would be practicable to forward that part of the cargo which remained in specie, from St. Helena to Loanda, at a cost less than its value when delivered there.

The Court was to have power to draw all inferences of fact from the facts stated in the case; and all amendments in the pleadings(b) and in the case, which the Court should think necessary to raise the real questions in dispute, were to be made.

*167] *The questions for the opinion of the Court were. 1. Whether, under the circumstances, there was any loss for which the plaintiffs were entitled to recover. If the Court was of opinion in the negative, judgment was to be entered for the defendant, with costs. If the Court was of opinion in the affirmative, it was requested to decide; 2. Whether, as to the whole or any part of the cargo, there was a total loss, with benefit of salvage; and it was agreed that it should be referred to an average adjuster of London to ascertain what was the average per centage of the salvage or partial loss or losses, as the case might be, and that judgment should be entered for the plaintiffs for that per centage on 150% with costs.

Wilde, for the plaintiffs.(c)—First. The seizure of *The Newport* by the *Philomel*, being wrongful, constituted a total loss of the goods on board by a peril insured against, within the meaning of the policy. This loss, if not a loss by perils of the sea, falls within the general words "all other perils, losses, &c.:" *Cullen v. Butler*, 5 M. & S. 461. [Lord CAMPBELL, C. J.—I should be disposed to think that it comes

(a) See the report of the case in the Privy Council: *Hocquard v. The Queen, The Newport*, 11 Moore's P. C. Cases, 155, 162.

(b) A copy of the pleadings accompanied the case. The date of the writ was 6th July, 1858.

(c) Tuesday, May 31st. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.

within the words "takings at sea, arrests, restraints, and detainments of all kings, princes, and people." It may well be held to do so, in accordance with the law, as laid down in Arnould's Treatise on the Law of Marine Insurance and Average, vol. ii., part iii., sect. v. § 293, p. 803 (2d ed.), that, in cases "in which the assured and underwriter are both subjects of the same state," "it may now be taken as settled law, that the underwriter is liable for all loss occasioned by the public acts of the *home* government, in detaining, arresting, or laying an embargo on the ship either *in the home or a foreign port." [*168 Moreover, as the seizure was wrongful, the loss is analogous to one by a collision between the vessel of the assured and another vessel which is wholly in fault. Both are cases in which the underwriter is liable to the assured for the wrongful act of a third person. And the notice of abandonment, which was given with all due promptitude upon the seizure becoming known to the assured, made the loss a total one. The loss, therefore, being total then, the question arises, secondly, whether it has at any time since ceased to be total, and become partial only. None of the circumstances which have occurred since the seizure have had the effect of so cutting down the loss. In *Holdsworth v. Wise*, 7 B. & C. 794, 799 (E. C. L. R. vol. 14). Bayley, J. thus lays down the true criterion: "There are cases which show, that the mere existence of a ship" (which was there the subject of insurance), "after a total loss and abandonment will not reduce it to a case of partial loss, *M'Iver v. Henderson*, 4 M. & S. 576, *Cologan v. The London Assurance Company*, 5 M. & S. 447. The ship must be in esse in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it." This doctrine was followed in *Dean v. Hornby*, 3 E. & B. 180 (E. C. L. R. vol. 77). Applying it to the facts of the present case, it is true that Flores might, since the seizure, have taken possession of such of the goods as remained in specie, though deteriorated, at St. Helena; but it is equally true that he could not reasonably be expected to do so. It is found by the case that he could not have obtained possession till December, 1856, and then only on the terms of giving security for the invoice cost, without regard to the depreciation in the value of *the goods. It is also found that it would [*169 now be practicable to forward the goods from St. Helena to Loanda at a cost less than their value when delivered there. No reasonable man could have been expected, in December, 1856, to take to the goods on the terms stated: still less could he now be expected, after the lapse of so long a time, to take to them with a prospect of realizing, at Loanda, possibly a mere fraction more than the cost of sending them there. [ERLE, J.—Is there any case which lays down a rule for deciding when the assured may be reasonably expected to take possession of the subject of insurance?] There is no case which lays down the law more precisely than *Holdsworth v. Wise*, 7 B. & C. 794, 799 (E. C. L. R. vol. 14). The test, however, is, whether the whole adventure is so broken up by the loss as that a reasonable man would not prosecute it any further. If so, the assured is entitled to abandon, and, by giving due notice of abandonment, renders the underwriter liable as for a total loss: *Barker v. Blakes*, 9 East 288. The decision in *Anderson v. Wallis*, 2 M. & S. 240 (E. C. L. R. vol. 28),

gives the limit in the other direction, and shows that a mere temporary retardation of the voyage is not a good cause of abandonment, so as to create a total loss. Here the retardation was more than temporary: several years elapsed, since the seizure, before the assured had even a chance of being able to prosecute the adventure again; and by that time the goods were much deteriorated. *Naylor v. Taylor*, 9 B. & C. 718 (E. C. L. R. vol. 17), which may be cited on the other side, is distinguishable, on the ground that the assured, in that case, were precluded from relying on their notice of abandonment, by the ultimate state of facts as appearing before action brought; and that they might have been reasonably expected to take possession of the goods, of the *deterioration of which there was no proof. *170] It may also be observed that, in that case, the total loss had ceased before the notice of abandonment was given. *Wilson v. Marryat*, 8 T. R. 31, is an instance in which the assured recovered as for a total loss, upon the seizure by a king's ship of the ship and goods insured, on an unfounded suspicion that the ship was an illicit trader.

Bovill, contra.—First: no case has been cited on the other side, nor can any be found, where underwriters have been held liable to the assured for the act of a British man-of-war, under such circumstances as the present, in seizing the property assured. Where the cause of loss is the act of the executive government of this country, there is no ground for any claim under the policy. It could not be said, for instance, that an execution levied upon the cargo, by sheriff's officers, who act in the name of the Queen, and a sale of the cargo thereunder, would be a loss of the cargo by any of the perils insured against; whether or no the execution was wrongfully issued, though rightfully levied. So, again, the arrest of a vessel under process of the Admiralty Court of England, in a suit of collision, would not be a loss of the vessel, within a policy on ship. [Lord CAMPBELL, C. J.—The only cases which can be put as illustrations of the present are cases of a seizure of ship or cargo wrongful in the first instance. CROMPTON, J.—In the cases which you put, the seizure, though in form in the name of the Queen, is, in reality, the act of a subject, and so cannot, of course, be treated as an "arrest of princes."] The seizure of a ship as a smuggler, which is no smuggler, would be the *171] wrongful act of the Queen: but would not constitute a *loss for which the underwriters would be liable. [Lord CAMPBELL, C. J.—It may be that such an ill-founded seizure might give the assured a ground of claim.] In the present case the Crown was acting within its strict rights, in seizing the *Newport* on suspicion of being a slaver, and bringing her before the proper tribunal for adjudication. And the Court at St. Helena gave judgment in favour of the seizure. ERLE, J.—So long as that judgment was in force, it rendered the act of seizure valid; but it cannot now be relied upon, as it has been reversed by the Privy Council. Lord CAMPBELL, C. J.—The proceedings in the Court at St. Helena must now be considered to have been erroneous and invalid from the beginning.] It must be admitted that the Privy Council arrived at the conclusion that the seizure was unlawful. Quoad the goods, it certainly could not have been justified. For the ship was seized under stat. 5 G. 4, c. 113; sect. 4 of which provides for the forfeiture of a ship engaged in the slave trade,

and of all goods, belonging to the shipowner, found on board: but does not authorize the seizure of any goods found on board, otherwise owned. Sect. 7 makes the shippers of goods, to be employed in the slave trade, liable to a penalty of double the value of the goods; but neither that or any other section in the Act justifies the seizure of such goods. [Lord CAMPBELL, C. J.—As the statute gives the right to seize the ship, it impliedly gives also the right to seize all goods which are in the ship.] At all events, the seizure, whether it might have been justified or not, was not a loss of the goods within the policy. Of the cases cited on the other side, *Cullen v. Butler*, 5 M. & S. 461, is the only *one which shows that the destruction [*172 of a ship and goods by another ship, acting mistakenly, may be a loss of the goods within the perils insured against. There, however, the goods were actually lost, going to the bottom with the ship which was sunk. In *Wilson v. Marryat*, 8 T. R. 81, an American ship, not subject to English law, was seized by an English ship for a violation of English law; and the seizure was, therefore, clearly wrongful. Secondly: the loss, if any, of the goods, either never was total, or had, before action, ceased to be so. It might have been total, had the *Newport* been captured as a prize, in which case the property in the goods would have been changed by the capture: but she was not taken as a prize. Moreover, the goods were taken merely *ex necessitate*, because they were in the ship; nor did the judgment of the Court at St. Helena change the property in them. [CROMPTON, J.—If the owner is ultimately deprived of the goods, it is quite immaterial whether or not the property in them was changed by the seizure.] At all events, the seizure did not *prima facie* constitute a total loss. [CROMPTON, J.—I think that it did; and that the onus of showing the contrary rests upon the underwriters. Lord CAMPBELL, C. J.—By stat. 5 G. 4, c. 113, s. 7, twice the value of the goods might have been exacted from the owner had the ship been proved to be a slaver. Surely, then, the owner had a right to convert the seizure into a constructive total loss, by giving notice of abandonment.] The seizure of the goods caused merely a temporary loss or retardation of the voyage; and this, according to the law as laid down in *Anderson v. Wallis*, 2 M. & S. 240 (E. C. L. R. vol. 28), and in other cases collected and commented upon in Arnould's *Treatise on *the Law of Marine Insurance and Average*, vol. ii., pp. 1129– [*173 1133 (2d ed.), gives the assured no right to abandon, unless the goods would be worth nothing if ultimately sent on. In the present case, the goods have been released, and can now be sent on at a profit. Such being the existing state of things, the loss, even if it ever was total, is now partial only, according to the principle laid down by Sir J. Mansfield, C. J., in *Thellusson v. Shedden*, 2 New Rep. 228, 230, where he says, "It is true that a capture simply proves a total loss, but when the plaintiff in the same breath proves a recapture, there is an end to the capture and total loss, and the plaintiff is entitled to a partial loss only." *McCarthy v. Abel*, 5 East 888, and *Bainbridge v. Neilson*, 10 East 329, are authorities that the assured, although he has given notice of abandonment, can recover only according to the actual nature of his damnification at the time of action brought; and that if, at that time, the loss has ceased to be total, he

cannot recover for it as total. A policy of insurance is a contract of indemnity: whenever, therefore, the subject-matter of the insurance can, at the time of action brought, be in part restored to the assured, the latter can have no right to recover more than will indemnify him for the part which is lost. *Brotherston v. Barber*, 5 M. & S. 418, is a decision to that effect: and the judgment of the Court of Exchequer Chamber in *Palmer v. Naylor*, 10 Exch. 382,† recognises the principle that a change of circumstances may reduce a total to a partial loss. In *Holdsworth v. Wise*, 7 B. & C. 794 (E. C. L. R. vol. 14), where the assured, after notice of abandonment, recovered as for a total loss, *174] though the *ship insured existed in specie at the time of action brought, they obtained judgment on the ground that the ship was subject to claims for salvage and repairs equal to or exceeding her value. So, in *Barker v. Blakes*, 9 East 283, where it was held that the assured on goods might, had he given timely notice of abandonment, upon their seizure, have recovered as for a total loss, although the goods had been afterwards liberated; the further prosecution of the voyage had been prohibited, and it had thus been rendered impossible to forward the goods to their destination. So, again, in *Cologan v. The London Assurance Company*, 5 M. & S. 447, it was rightly held that there had been a total loss of the wheat there insured, because the part of the wheat which had been saved and sent on had been sold for the benefit of all concerned, and could not, therefore, be restored to its original owners. Lastly, the underwriters cannot be held responsible for the detention of the goods; which was the act of the Court at St. Helena, a Court of competent jurisdiction, and the proceedings of which in the matter were proper and regular.

Wilde, in reply.—The Court at St. Helena gave judgment against the ship, not against the goods. Flores was no party to the suit there; and the judgment, though in rem against the ship, was in personam only against Pinto, Perez & Co. Hence Flores would not have been barred by that judgment, while it remained in force, from contesting the validity of the seizure of his goods; but even if he would, during that time, have been under a temporary disability to raise the ques- *175] tion, the reversal of *the judgment remitted him to his original rights. The decision of the Privy Council establishes that the seizure of both ship and goods was wrongful; and the case of *Cullen v. Butler*, 5 M. & S. 461, to which no real answer has been given by the other side, shows that the wrongful act of a Queen's ship is a peril insured against. As to the argument that the loss, if once total, had, at the time of action brought, become partial: if there once was a total loss, the only remaining question is, whether it has since become partial, by reason of the assured having since had it in his power to prosecute the original adventure, under circumstances which might reasonably induce him to do so. *Barker v. Blakes*, 9 East 283, shows that the mere existence of the goods in specie, at the time of action brought, is not enough to cut down the rights of the assured, if he cannot then be expected to complete the adventure. The judgment in *Cologan v. The London Assurance Company*, 5 M. & S. 447, involves the same principle. *McCarthy v. Abel*, 5 East 388, and *Bainbridge v. Neilson*, 10 East 329, were cases in each of which the original total loss sustained by the assured had, before action, become,

partial only; some of the freight insured having in each case been actually earned. Those cases have, therefore, no application to the present.^(a)

Cur. adv. vult.

*Lord CAMPBELL, C. J., now delivered the judgment of the Court.—The first question which presents itself is, whether the [*176 taking of the ship Newport by the Philomel, with the goods insured on board, was a peril insured against. We are clearly of opinion that it was. The policy expressly enumerates (among such perils) "takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nature, condition, or quality soever." If this had been a lawful taking at sea by a British cruiser, the underwriters would not have been liable; but it must now be definitively considered to have been a wrongful taking; and, this being so, the nationality of the captors becomes immaterial. The wrongful taking of this ship cannot be regarded as an act ordered or sanctioned by the English Government. A more difficult question follows: whether, under the very peculiar circumstances of this case, the loss is to be pronounced total or partial. It appears to us that, at one time, it certainly was a total loss; and the doubt is whether, by subsequent events, it has been converted into a partial loss. When the ship, with the goods on board, had been wrongfully seized and sent by the captors to St. Helena for condemnation, although the property in the goods remained in Flores, he was entitled, by giving notice of abandonment, to sue for a total loss; and had the ship, with the goods on board, been sunk before she reached St. Helena, he might clearly have recovered as for a total loss. It is admitted that formal notice of abandonment was, without delay and in due time, given to the underwriters on 13th December, 1854. Previously to this, namely, on 20th November, 1854, the decree of condemnation had been pronounced by the Admiralty Court at St. Helena; but this was unknown in London *when the notice of abandonment was given. That decree in [*177 no manner restored the goods to the assured. While it subsisted, it might have operated as a bar to his action against the underwriters; but it could only have been used, while it subsisted, as evidence of the illegality of the voyage, and when it was reversed the legality of the voyage was definitively established. The judgment of the Privy Council related to the moment when the sentence of condemnation was pronounced at St. Helena, and destroyed any invalidating effect it might otherwise have had on the notice of abandonment. As, from the wrongful seizure and notice of abandonment, the loss was at one time to be regarded as total, the onus seems to be cast upon the underwriter of showing that, by subsequent events, it ceased to be so. And if, before action brought, the goods had been restored to the assured, or he had had the means of getting possession of them, under such circumstances as ought to have induced a prudent man to take possession of them, his claim could now only have been made for a partial loss. It has often been held that, if the ultimate consequence

(a) There was a further point argued by the counsel on either side: Whether, supposing the Court to be of opinion that there was a partial loss only of the cargo, the costs and damages of the legal proceedings at St. Helena and before the Privy Council, and which the Privy Council had refused to Flores, were recoverable against the underwriters. As, however, the Court decided that the loss was total, it is unnecessary to report the argument on this point.

of a peril insured against is merely the loss of a voyage or a suspension or retardation of a mercantile adventure; although a notice of abandonment had been justifiably given, a total loss cannot be claimed. But the mere existence of the ship or goods insured, after a total loss and abandonment, so that possession of them may possibly be resumed by the owner, will not reduce it to a partial loss: *M'Iver v. Henderson*, 4 M. & S. 576, *Cologan v. The London Assurance Company*, 5 M. & S. 447. The true rule seems to us to be laid down by Bayley, J., in *Holdsworth v. Wise*, 7 B. & C. 794, 799 (E. C. L. R. vol. 14), that *178] the subject of the insurance *must be in existence "under such circumstances that the assured may, if they please, have possession, and may reasonably be expected to take" possession of it. But in the present case Flores could not have obtained possession of the goods on any terms till December, 1856, and then only by giving security for the invoice cost, without regard to the depreciation in value. A small part of the goods, being perishable, was sold at St. Helena, and the residue had remained there as a security for the penalty of double value awarded against the shipper. The decree of the Admiralty Court being reversed by the Judicial Committee of the Privy Council in 1858, all that is stated in the case, on behalf of the underwriters, to show that the loss is now only partial, is, that "It is to be taken as admitted, for the purpose of obtaining the judgment of the Court," "that it would be practicable to forward that part of the cargo which remained in specie, from St. Helena to Loanda, at a cost less than its value when delivered there." Can it be expected that Flores, as a prudent man, after the lapse of years, should, in the bare prospect of realizing by the sale of the goods at Loanda something beyond the amount of these expenses, send orders to St. Helena to forward the goods to their original destination? Here we have not a mere loss of the voyage, or a suspension or retardation of the adventure, but its utter ruin. The goods (which are said to be "deteriorated"), although they might once have been advantageously disposed of on the coast of Africa, might now fetch there only a few shillings more than the cost of their transport thither. Besides, we must bear in mind that, according to the plan of the original adventure, Flores had chartered the ship to the coast of Africa and back, *179] *and he was to dispose of the outward cargo, the subject of the insurance, for African produce, to be loaded in her for the United Kingdom. Drawing an inference of fact from the evidence (as we are authorized to do), we think that a prudent man, under the circumstances in which Flores found himself when he commenced this action, would not have taken possession of the goods at St. Helena unless to sell them there for what they would fetch, as if there were no means of forwarding them to Loanda; and that he had a right to sue the underwriters for a total loss, they having the benefit of salvage. In the actual result, a total loss has substantially accrued to the assured from the direct consequence of a peril insured against; and, unless we are to hold that he is entitled to recover as for a total loss, this policy of insurance would not operate as a contract of indemnity.

Such being our view of this case, the questions propounded to us by Mr. Bovill, on the supposition that we might pronounce for a par-

tial loss, do not arise, and the arbitrator who is to adjust the total loss requires no special directions from us.

Judgment for the plaintiffs.

The usual clause in policies of insurance against "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever," has been held in the United States to apply in certain cases to acts of the home government, as for instance, an embargo: *Odlin v. Ins. Co. of Penna.*, 2 Wash. C. C. 312; *McBride v. Marine Ins. Co.*, 5 Johns. 299; *Walden v. Phoenix Ins. Co.*, Id. 810; *Ogden v. N. Y. Fire Ins. Co.*, 10 Johns. 177; 12 Id. 25; *Lorent v. S. Car. Ins. Co.*, 1 N. & M. 365; though in *Delane v. Bedford Ins. Co.*, 10 Mass. 347, the court seems to have inclined the other way. But this is, of course, only where the voyage was originally lawful, or the cause of seizure or restraint is not the wilful breach of any valid law or ordinance. And as the duty of obedience by a citizen to the laws of his own country is more extensive than the duty of respect to the laws of any foreign country, for instance in respect to illicit or prohibited trade, so must there be a corresponding difference in the construction of the clause in question.

As respects a foreign insurer, there are cases in England which hold that the insured, being, so to speak, a party to the acts of his own government, is bound by them, and therefore by a domestic embargo, though the point is not perhaps settled. See 2 Arnould Ins. 783. But in a case in New York, *Tranin v. Ocean Ins. Co.*, 6 Cow. 404, 2 Wend. 64, where a British vessel insured in New York, was seized off Antigua by a British cruiser, on the pretence of being engaged in illicit trade, and condemned in a British colonial court, it was held that if the sentence was erroneous and the trade

not in fact unlawful, the insured was not bound by it, as a judgment of his own country, and the whole doctrine, even as to public or legislative acts, dissented from. See also 3 Kent Com. 292.

On the other hand, under the exception to this clause often inserted in policies in this country, that the insurers shall not be answerable "for any charge, damage, or loss, which may arise in consequence of seizure or detention for or on account of illicit or prohibited trade, or in articles contraband of war," it has been held that it is not necessary, in order to bring a case within this exception, that there should have been a legal or justifiable cause of condemnation, but it is sufficient that there was a legal or justifiable ground of seizure or detention, and such a seizure or detention, made in good faith, on reasonable ground of suspicion or probable cause, would preclude the insured's remedy on the policy: *Bradstreet v. Neptune Ins. Co.*, 8 Sumn. 600; *Magoun v. New England Ins. Co.*, 1 Story 159; *Carrington v. Merchants' Ins. Co.*, 8 Peters 495: though a mere pretext of such trade where none really existed, would not be enough: *Carrington v. Merchants' Ins. Co.*, *ut supra*; *Smith v. Del. Ins. Co.*, 3 S & R. 82; *Francis v. Ocean Ins. Co.*, 1 Cow. 404; 2 Wend. 64.

As to the effect of the general words in the policies "and of all other perils, losses, or misfortunes, &c.," which are usually held only to apply to cases *ejusdem generis* with those expressly enumerated, see 2 Arnould 842; 1 Phill. 687; 1 Pars. Maritime Law 252; and the recent case of *Monongahela Ins. Co. v. Chester*, 48 Penn. R. (7 Wright) 491.

The question as to the extent of the

destruction or deprivation of use of the thing insured which will justify or dispense with an abandonment, about which there has been much difference of opinion, will be found ably discussed in the notes to *Wood v. Lincoln*, 2 Am. Lead. Cases 483; and *Morean v. U. S. Ins. Co.*, Id. 510.

END OF TRINITY TERM.

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*MEMORANDA.

In Trinity Term, J. Hinde Palmer, Esq., of Lincoln's Inn; Archibald John Stephens, Esq., of Gray's Inn; and William David Lewis, Esq., of Lincoln's Inn, were appointed Queen's counsel.

In the same Term,

The Right Hon. Frederick Lord Chelmsford resigned the Great Seal, which Her Majesty was graciously pleased to deliver to the Right Hon. Lord John Campbell, Lord Chief Justice of England.

Sir Alexander James Edmund Cockburn, Bart., Lord Chief Justice of the Court of Common Pleas, was appointed Lord Chief Justice of England, on the resignation of Lord Campbell.

Sir William Erle, Knight, one of the Judges of this Court, was appointed Lord Chief Justice of the Court of Common Pleas, on the resignation of Sir A. J. E. Cockburn, Bart.

Sir Fitzroy Kelly, Knight, and Sir Hugh M'Calmont Cairns, Knight, resigned the offices of Attorney and Solicitor General respectively; Sir Richard Bethell, Knight, was appointed Her Majesty's Attorney-General, and Sir Henry Singer Keating, Knight, Her Majesty's Solicitor-General.

In the ensuing Vacation, Colin Blackburn, Esq., of the Inner Temple, was appointed one of the Judges of this Court, on the resignation of Sir William Erle, Knight, and was on that occasion called to the degree of the coif, and gave rings with the motto "Promere jura." He afterwards received the honour of knighthood.

CASES

ARGUED AND DETERMINED

IN

Trinity Vacation,

IN THE

TWENTY-SECOND YEAR OF THE REIGN OF VICTORIA. 1859.

The Judges of the Court of Queen's Bench who sat in banc in this
Vacation were,—

WIGHTMAN, J.,

HILL, J.

IN THE EXCHEQUER CHAMBER.(a)

(Error from the Queen's Bench.)

The QUEEN, on the Prosecution of the Guardians of the Poor of
the Parish of BIRMINGHAM, *v.* BACCHUS and Another, two
of the Justices of the Peace for the County of WARWICK.
June 17.

Under stat. 18 & 19 Vict. c. 105, s. 14, if lunatics whose settlement cannot be ascertained are sent to an asylum from a borough having a separate Court of Quarter Sessions, the borough is liable to the expenses if it does not contribute to the county rate under stat. 5 & 6 W. 4, c. 76, s. 117, and is not liable if it does so contribute.

By the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench.

THIS was an appeal against the decision of the Court of Queen's Bench in *Guardians of Birmingham v. Beaumont*, 8 E. & B. 870 (E. C. L. R. vol. 92), giving judgment for the defendant upon a *special case stated by consent for the opinion of the Court.

Mellor was heard for the plaintiffs in error, and *Macaulay* [*182
for the defendants in error.

The special case is set out in the report of the proceedings in the Court below.(b) It is not thought necessary to report the argument in error, which was substantially the same as in the Court below.

COCKBURN, C. J.—We are all of opinion that the judgment of the Court below should be affirmed. It is possible that the Legislature intended, by sect. 14 of stat. 18 & 19 Vict. c. 105, to do more than,

(a) Before Cockburn, C. J., Williams, Willes, Byles, Js., Martin, Bramwell, Watson, and Channell, Bs.

(b) *Guardians of Birmingham v. Beaumont*, 8 E. & B. 870 (E. C. L. R. vol. 92).

giving the section its natural construction, we can say has been done. But it is plain that the Legislature has enacted that those boroughs only which are not liable to the payment of a proportion of the sums expended out of the county rates are chargeable with the maintenance of lunatic paupers without a settlement, found in the borough and sent to the asylum. Birmingham is not such a borough, and therefore is not so chargeable. The real intention of the Legislature may be doubtful, but the language of the section, fairly and reasonably construed, admits of no doubt.

WILLIAMS, J.—I am entirely of the same opinion. Stat. 18 & 19 Vict. c. 105, s. 14, refers to only a particular class of boroughs, namely, those not liable under sect. 117 of stat. 5 & 6 W. 4, c. 76 (which is expressly referred to) to the payment of a proportion of the *sums
*183] expended out of the county rates. That class of boroughs alone is to be chargeable with the maintenance of lunatic paupers without a settlement, found in the borough, and sent to the county asylum. Birmingham is not a borough of that class: and therefore the judgment of the Court below was clearly right.

MARTIN, B.—I am of the same opinion. The language of stat. 18 & 19 Vict. c. 105, s. 14, is perfectly clear: and we are not at liberty, on the ground of some supposed injustice in the working of the Act, to assume that the intention of the Legislature was different from that which is set forth by the language of the Act itself.

WILLES, J., and BRAMWELL, B., concurred.

WATSON, B.—I am of the same opinion. Sect. 14 of stat. 18 & 19 Vict. c. 105, refers to sect. 117 of stat. 5 & 6 W. 4, c. 76, in describing the class of boroughs which is to be liable for the maintenance of lunatic paupers without a settlement, found in the borough. I have no reason for supposing that the Legislature did not intend to make that class, and that class only, of boroughs so liable: and we have no right to assume otherwise, in the face of so explicit an enactment.

BYLES, J.—Whatever the intention of the Legislature may have been, we are bound, I think, by the language of the Act. The Court below has decided in accordance with the literal construction: and I see no reason for departing from it.

*184] *CHANNELL, B.—I have had some doubts, during the argument, which are not entirely removed; but the language of the Act is very distinct, and I am not disposed to dissent from the judgment of the rest of the Court. Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

BONOMI v. BACKHOUSE. June 18.

[Reported E. B. & E. 647 (E. C. L. R. vol. 96).]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The Company of Proprietors of The WATERLOO BRIDGE Company *v.* WILLIAM CULL. *June 18.*

[Reported 1 E. & E. 245 (E. C. L. R. vol. 102).]

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

JACKSON and Another *v.* FORSTER. *June 18.*

[Reported 1 E. & E. 470 (E. C. L. R. vol. 102).]

***IN THE EXCHEQUER CHAMBER. [*185**

(Error from the Queen's Bench.)

The QUEEN, on the Prosecution of the Poor Law Board, *v.* The Governors and Directors of the Poor of the Parish of ST. JAMES, within the Liberty of WESTMINSTER. *June 20.*

[Reported 1 E. & E. 872 (E. C. L. R. vol. 102).]

The QUEEN *v.* The Inhabitants of SKIRCOAT. *July 2.*

An order of removal was served on 13th September, 1858, and notice of appeal served on 24 October, 1858. By the rules of practice at the Sessions, ten clear days' notice of trial was required to be given by appellants. No notice of trial, nor grounds of appeal, were served before the next Quarter Sessions, which were held on 18th October, 1858. At these Sessions appellants entered and respited their appeal. On 18th December, 1858, appellants served a notice of trial of the appeal at the Quarter Sessions held on 4th January, 1859, accompanied with a statement of the grounds of appeal. The appeal was heard at the January Sessions, and the order of removal was quashed.

Held, that the Sessions had jurisdiction to adjourn the hearing of the appeal from the October to the January Sessions: but that, as the appellants had had time to bring on the trial of the appeal at the October Sessions, the better course would have been to refuse an adjournment.

ON appeal against an order, made by two justices for the West Riding of the County of York, for the removal of Sarah Cockroft, a pauper, from the township of Skircoat to the township of Ovenden, both in the West Riding, the order was quashed, subject to the opinion of this Court upon the following case:—

The order of removal was served upon the overseers of Ovenden on 18th September, 1858, against which *order the overseers of Ovenden served the overseers of Skircoat with notice of [*186

in reference to the case to be prepared for the purpose of obtaining the opinion of Her Majesty's Court of Queen's Bench, as to the exemption by law of certain land and buildings within or appertaining to the University, Colleges, and Halls, from being rated to the relief of the poor. Seconded by Mr. Bossom."

The motion was negatived, and the amendment was carried by a majority of fifteen to nine.

The following is a copy of the rule for a concilium, upon which the case was set down for argument.

"Tuesday, 25th November, in the 20th year of the reign of Queen Victoria.

"In the Queen's Bench.

"Oxford.

"The Queen, on the prosecution of the Guardians of the Poor within the city of Oxford, against The Vice-Chancellor of the University of Oxford.

"At the instance of the defendant, it is ordered that there be a concilium in this prosecution; and that this case be set down in the Crown paper for argument on Saturday, 17th January, in the next Term.

"Upon the motion of Mr. Welsby.

"By the Court."

*198] "The special case came on for argument before the Court of Queen's Bench, on 27th May, 1857; and the Court held that some of the disputed buildings were, and some were not, rateable(a)

The following is a copy of the rule of the Court of Queen's Bench, containing the judgment of the Court upon such argument.

"Tuesday, 12th June, in the 20th year of the reign of Queen Victoria.

"In the Queen's Bench.

"Oxford.

"The Queen, on the prosecution of the Guardians of the Poor within the city of Oxford, against The Vice-Chancellor of the University of Oxford.

"Upon hearing counsel on both sides, and mature deliberation thereupon had, it is considered and adjudged. That the University of Oxford is not liable to be rated to the relief of the poor within the city of

Oxford, in respect of the Bodleian Library; the Divinity and other schools; the Convocation House; the old Convocation House and Law School; the Sheldonian Theatre (except the large room or cellar under the same); the upper part of the Ashmolean Museum used as a museum; the Clarendon Buildings; the Botanic Garden itself; the Taylor Institution, and the University Galleries.

"But that the said University is rateable in respect of the said cellar. And that the house of residence for the Professor, within the boundary of the said Botanic Garden; the lodge at the entrance thereof, in which the porter lives; the head gardener's house outside the said garden on the south side thereof, and the small plot of ground appropriated to his use, are property rateable to the relief of the poor within the said city. And that the Colleges are so rateable in respect of the College chapels and the College libraries, all mentioned

*199] in the *case agreed upon between the parties in this prosecution."

"Mr. Pashley, for the prosecutors.

"Mr. Solicitor-General, for the defendant.

"By the Court."

(a) Oxford Stat., 2 E. & B. 191 (R. C. L. R. vol. 10).

In obedience to this rule, the buildings declared rateable have ever since been rated, and the defendants have received the proceeds of such rating. Mr. Morrell's bill of costs, in relation to the said special case, has been delivered to and paid by the University. On 10th November, 1857, the plaintiffs received from Mr. Jacob, the clerk of the Board of Guardians of the Poor within the city of Oxford, a letter applying for their bill of costs in the matter of the said special case; and, on 2d December, 1857, such bill of costs was delivered, accompanied by a letter to the clerk of the Board. This letter, enclosing a bill, was read to the Board, and the bill was referred to the further consideration of the Board. Such bill was duly taxed by the proper officer, and, when taxed, amounted to 209*l.* 17*s.* The plaintiffs, being unable to obtain payment of their bill, sent several letters to the said clerk, requesting payment. Their last formal letter was read at a meeting of the Board held on 3d February, 1859. Whereupon the rector of Exeter College, one of the Guardians, moved, "That as this claim (meaning the plaintiffs' claim for their said bill) has not regard to the incorporation of the Guardians of the Poor within the city of Oxford, the Board do not entertain it, but proceed to other business." It was moved by way of amendment, by Mr. Dee, another guardian, "That Mr. Mallam's bill for his costs in the special case be paid:" and such amendment was carried by a majority of fourteen to ten.

*The Guardians of the Poor of the several parishes in the city of Oxford, as such, have not, and from the time of the [*200 passing of the said Act of 1854 have not had, any funds under their control.

The pleadings, the order of *Nisi Prius*, certain portions of the correspondence above referred to, which were set out in the appendix, and the other matters stated in the appendix, (a) were to be read as part of the case.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendants the amount of their bill of costs relating to the said special case, or any part thereof.

If the Court should be of opinion in the affirmative, then the verdict for the plaintiffs was to stand for such sum as the Court should direct. If in the negative, then the verdict was to be set aside, and in lieu thereof a nonsuit or verdict for the defendants was to be entered.

Honyman, for the plaintiffs. (b)—The plaintiffs are entitled to recover against the defendants the full amount of the plaintiffs' bill of costs relating to the special case. In the first place, the plaintiffs are so entitled, because the defendants are the successors of the old corporation of "The Guardians of the Poor within the city of Oxford," created by stat. 11 G. 3, c. 14, s. 1. The retainer of the plaintiff, Mr. Thomas Mallam, on 24th November, 1853, under the corporate seal of this, the then existing body *of Guardians, as "Solicitor for this [*201 Board in the matter of the College rating, and soliciting the

(a) Namely, extracts from the minute-book of "The Guardians of the Poor within the city of Oxford," from 2d February, 1854, to 14th April, 1859, relating to the plaintiffs' services and claims: none of which, however, it is material to set out.

(b) Saturday, January 4th. Before Lord Campbell, C. J., Wightman, and Erie, J.

bill for that purpose through Parliament," is binding upon the defendants, the present Board. [Lord CAMPBELL, C. J.—That retainer seems limited to passing the bill through Parliament.] It extends also to the matter of the College rating. Moreover, the defendants, by passing Mr. Carr's amendment to Mr. Neate's motion, on 20th November, 1856, ratified and adopted the retainer. But, further, sect. 81 of the Act itself, 17 & 18 Vict. c. cxxix., which the plaintiffs were retained to assist in passing through Parliament, clearly provides that the defendants shall be liable to their solicitors, the plaintiffs, for the costs attending the special case which it was determined should be stated. That section enacts as follows: "And whereas the said University, and the said Colleges and Halls thereof, claim that certain land and buildings within or appertaining to the same are exempted by law from being rated to the relief of the poor, and the Vice-Chancellor of the said University of the one part, and the Guardians of the Poor of the several parishes of the other part, have agreed that a case shall be stated (to be prepared by their respective solicitors, and settled, if there should be any difficulty or disagreement, by some barrister at law to be chosen by them for that purpose) for the purpose of obtaining the opinion of Her Majesty's Court of Queen's Bench whether by law the same, or any and which of them, are or ought to be exempt from being rated to the relief of the poor: Be it enacted that upon such case being stated as aforesaid it shall be lawful for the said Court to receive and determine such case, although no appeal against any rate shall then be pending, and the decision of such Court thereupon shall be *final and binding upon the parties aforesaid, and the costs attending the same shall be borne by the respective parties, and those incurred by the University Colleges and Halls shall be paid by them, and those incurred by the said Guardians shall, when duly taxed, be paid out of the funds under their control." The recital in this section, that the agreement to state the case had been come to between the Vice-Chancellor and "The Guardians of the Poor of the several parishes" in Oxford is inaccurate; the parties to that agreement were the Vice-Chancellor and "The Guardians of the Poor within the city of Oxford," the body incorporated by stat. 11 G. 3, c. 14, s. 1; which consisted, not merely of guardians elected by the different parishes, but also of certain ex-officio guardians, namely "The Mayor, Recorder, Aldermen, Assistants, Town Clerk, and Solicitor" of the city of Oxford. And this is the body to which the defendants have succeeded. The section, it is true, provides that the decision of the Court of Queen's Bench upon the special case "shall be final and binding upon the parties aforesaid, and the costs attending the same shall be borne by the respective parties:" and it will probably be contended, in consequence, on the other side, that the intention of the Legislature must have been that the costs should be defrayed by the Guardians of the several parishes only, and not by the general corporate body. But the intention evidently was that the costs should be borne by the real parties to the agreement; and the case expressly finds that the whole corporate body, not the guardians of the parishes merely, were parties to it. This is evident also from the names of the parties to the special case, contained both in the rule for a concilium and in the judgment of

the Court upon *it. Moreover, the enactment, at the end of sect. 31, that the costs "incurred by the said Guardians shall" [*203 "be paid out of the funds under their control," shows conclusively that the whole Board of Guardians must be referred to: inasmuch as the case finds that the Guardians of the parishes in Oxford, as such, "have not, and from the time of the passing of the" "Act of 1854 have not had, any funds under their control." It is impossible that the Legislature could have intended to direct payment to be made out of funds which did not exist.

Montague Smith, contra.—The plaintiffs are not entitled to be paid out of the general funds administered by the defendants. The obvious intention of the statute was to treat the University on the one side, and the parishes on the other, as the two litigant parties, who were to pay their respective costs attending on the statement of the special case. As to the retainer of the plaintiffs in November, 1853, by the old corporate body of guardians, it was founded on the resolution of the same date which appears in the minute-book, and which clearly confined the retainer to the passing of the bill through Parliament. The plaintiffs cannot, however, rely upon that retainer; whatever may have been its extent, it is not binding on the defendants. The plaintiffs' claim must stand or fall by the words of sect. 31 of the Act of 1854. Now, that section makes the "Guardians of the Poor of the several parishes" in Oxford the body liable to pay the costs of the special case; and it is not to be supposed that the whole body of Guardians of the Poor for Oxford is referred to by such a description. Sect. 2 of the Act constitutes the new Board of Guardians for the city and University a composite body, consisting of several sets of guardians, *one of them being "eleven guardians for the" "parishes," [*204 "one to be elected for each parish." Different clauses follow, relating to these several sets; one, sect. 5, relating exclusively to the guardians for the parishes. The same distinction is observed throughout the Act. By sect. 29, "The Vice-Chancellor" "of the one part" "and the guardians of the poor, elected or to be elected for the city and the several parishes aforesaid, of the other part," are to procure the appointment of a valuer to value the rateable property in the several parishes and in the University; and the Vice-Chancellor is to appoint one person, and the said guardians another, "to be paid by them respectively, to represent respectively, the" "University, Colleges, and Halls, and the said several parishes, before the said valuer." Whenever the whole composite body of guardians is referred to in the Act, it is styled "The Board of Guardians," simply. [Lord CAMPBELL, C. J.—After the Act of 1854 came into force, there was but one body of guardians in existence; the body, namely, made up of the different sets of guardians enumerated in sect. 2.] Should the Court be of opinion that the plaintiffs' services were bestowed for the whole body; still, a retainer under the corporate seal of the defendants would be necessary to entitle the plaintiffs to the judgment of the Court: *Arnold v. The Mayor of Poole*, 4 M. & G. 860 (E. C. L. R. vol. 43). Not being able to show any such retainer, the plaintiffs do not make out their case; notwithstanding the passing of Mr. Carr's amendment to Mr. Neate's motion in November, 1856.

Honyman, in reply.—It is not denied, upon the other side, that the

*205] defendants have known of, and have had *the benefit of, the plaintiffs' services for which compensation is now sought. As to the objection that the plaintiffs do not show a retainer under the defendants' seal; the adoption by the defendants of the amendment to Mr. Neate's motion, in November, 1856, was a recognition of the retainer of the plaintiffs by the old Board of Guardians, the defendants' predecessors; which was under seal. It was unnecessary to affix the corporate seal toties quoties. Then, as to the construction to be put upon stat. 17 & 18 Vict. c. ccxix. s. 31, no answer has been given to the objections urged on behalf of the plaintiffs. It may further be observed, however, that that section makes the special case, which was to be stated, a statutory substitute for an appeal by the University against a rate; which rate could have been made only by the defendants. The parties to such an appeal would have been the University on the one side and the present defendants on the other. It is, therefore, only reasonable to suppose that the Legislature intended the case to be stated by and between the same parties. Sect. 29 relates only to particular acts to be done, necessarily, by such of the members of the defendants, corporation as represent the city and the parishes, with reference to the valuation of rateable property therein; and has no bearing whatever on the meaning of sect. 31.

Cur. adr. vult.

HILL, J., now read the judgment of the Court.(a)—On a full consideration of the facts stated in the case, and of the Act, 17 and 18 *206] Vict. c. ccxix., we are inclined *to think that the action is maintainable. Irrespective of the Act, there is abundant evidence to support it. All the business for which the action is brought was done for the new corporation with their knowledge and with their sanction. The new corporation had authority to employ the plaintiffs to do this business; the dispute being between the united body of the corporation and certain bodies who disputed a liability which the corporation wished to throw upon them, respecting the payment of rates for the relief of the poor in Oxford; in the same manner as if these bodies, being assessed, had appealed against the rate, and a case had been to be prepared under the authority of the Sessions, for the opinion of the Court of Queen's Bench. We think, therefore, that it is incumbent on the defendants to show that the Act of Parliament exempts them from the liability which they would otherwise have incurred. But the 31st section, which is chiefly relied upon for this purpose, does not seem to us to have any such operation. It begins by stating an agreement between the old corporation and the Vice-Chancellor before the Act passed, and which was to be carried into effect when the old corporation had ceased to exist, and the new corporation was to come into existence. But when anything is mentioned to be done after this change, the parties are the Vice-Chancellor on the one part, and the new corporation on the other. If there had afterwards been an appeal, these must have been the parties: but the Legislature enacts, "That upon a case being stated" "it shall be lawful for the said Court to receive and determine such case, although no

(a) This judgment was prepared by Lord Campbell, C. J., who had, since the argument, been appointed Lord Chancellor. Erie, J., had been appointed Chief Justice of the Court of Common Pleas.

appeal against any rate shall then be pending, and the decision of such Court thereupon shall be final and binding upon the parties aforesaid."

*This must mean, upon the University, &c., and "the Guardians of the Poor within the city of Oxford;" for the corpora- [*207
tion under the old statute of 1771 had been extinguished; and it could neither be bound nor make any payments; all its property and powers being transferred to the new corporation. When the clause goes on to say that "the costs attending the same shall be borne by the respective parties, and those incurred by the University," &c., "shall be paid by them, and those incurred by the said Guardians shall, when duly taxed, be paid out of the funds under their control," we think the guardians here referred to must necessarily mean "The Guardians of the Poor within the city of Oxford," the only guardians who had funds under their control; the only guardians in existence, who could have any obligation imposed upon them. The University, in addition to paying their own share of the expense of the case as appellants, will certainly be called upon to contribute to the fund from which the other share will be paid: but this will only be a contribution by them as ratepayers, along with all the other ratepayers within the city of Oxford. There does not seem to be any peculiar hardship in this result; and it must be considered that an amalgamation took place upon the creation of the new corporation, and "Town and Gown" were united for the management and relief of all the poor within the city of Oxford. It would have been well if the expression at the conclusion of sect. 31 had been, instead of "the said Guardians," "the Guardians of the Poor within the city of Oxford;" but there were to be no other guardians after the new corporation had come into existence. The Legislature surely meant that the costs should be paid, and should be paid by the *guar- [*208
dians who had incurred them. But the costs sought to be recovered had been incurred by the defendants, who, as a body, employed the plaintiffs to prepare the case, as their solicitors, and to do all the business included in the plaintiffs' bill of costs. There does not seem to us to be anything inconsistent with this construction of sect. 31 to be found in sect. 29, respecting the valuation of property to be rated; as, for this particular purpose, the guardians elected under the new Act for the city and several parishes are created a body to do particular acts respecting the valuation, which they are capable of doing, and which could not be done by the whole of the new corporation. We do not think it necessary to advert at length to the objection made on behalf of the University, which, if well founded, would be fatal, [even(a)] if all the business had been done under an unsealed written retainer, although signed by all the Guardians, including the Vice-Chancellor, and although they had all specifically ordered, by unanimous resolutions, every step to be taken for which a charge is made in the plaintiffs' bill, and although every such step was necessary for obtaining the opinion of the Court of Queen's Bench; as we consider it quite clear that such a corporation had authority to direct such steps to be taken by a solicitor, without *toties quoties* affixing the corporation seal to the direction. Upon the

whole, our opinion is that we ought to give judgment for the plaintiffs.

Judgment for the plaintiffs.

*209] *The QUEEN v. The Bishop of CHICHESTER. July 2.

G., a clerk in holy orders, residing in the city and diocese of O., applied to the Bishop of C. to issue a commission, under stat. 3 & 4 Vict. c. 86, s. 3, against R., rector of the parish of W., in the diocese of C., to inquire into certain charges made by G. against R. of offences against the laws ecclesiastical. G. had no connection with the parish of W. or diocese of C., nor had he any private or personal interest in the said charges. The Bishop declined, after inquiry, to issue a commission.

Upon the showing cause against a rule for a mandamus to the Bishop, commanding him to issue a commission :

Held, by Lord Campbell, C. J., Wightman and Erle, Js. (dubitante Hill, J.), that, under the statute, the Bishop had a discretion as to issuing a commission or not.

Held, further, by all the Court, that, as it was in the discretion of the Court to grant a mandamus or not, the mandamus ought not to issue upon the application of one who was a stranger to the parish and diocese, and had no personal interest in the investigation of the charges.

BOVILL, in last Trinity Term, obtained a rule on behalf of the Rev. Charles Portales Golightly, calling upon the Bishop of Chichester to show cause why a mandamus should not issue commanding him to issue a commission, pursuant to stat. 3 & 4 Vict. c. 86, for the purpose of making inquiry as to the grounds of certain charges and reports against the Rev. Richard William Randall, in certain affidavits mentioned, and to take such proceedings with reference to the said commission and the said charges and reports as are required by the said statute.

From the affidavits in support of, and on showing cause against, the rule, it appeared that the applicant for the rule, Mr. Golightly, who was a clerk in holy orders, resided at 6, Holywell Street, in the city and diocese of Oxford. On 3d February, 1859, Mr. Golightly wrote to the Bishop of Chichester, requesting that a commission might issue, under stat. 3 & 4 Vict. c. 86, to examine into certain charges made by Mr. Golightly against the Rev. R. W. Randall, the rector of the united parishes of Woollavington cum Graffham, in the county of

*210] Sussex and diocese of Chichester. The charges were: "The using by" Mr. Randall, "in his church, a hymn translated from one in the Roman Breviary, by Thomas Aquinas, teaching the doctrine of transubstantiation. Directing his schoolmaster to teach, and himself teaching, the children in his school that there are seven sacraments; and that the Holy Communion may properly be called The Mass. That, in the administration of the Holy Communion, he elevated the cup, and mixed water with the wine. That he crossed himself after the Romish fashion during the celebration of divine service. That he made the sign of the cross upon the water at baptism." Most of these charges had been preferred against Mr. Randall, in 1858, by the then curate of the parish, and the Bishop then obtained a promise from Mr. Randall to discontinue the use of the hymnal, the using the sign of the cross, and the other practices already mentioned, at the celebration of the Holy Communion and at

baptism. The Bishop stated this fact in his written answer to Mr. Golightly's application, and, by the same letter, declined to issue a commission, being, as he stated in his affidavit, "convinced that such a step would have no effect except to cause a scandal in the Church, whilst, at the same time, it would be, in his opinion, unjust towards Mr. Randall and detrimental to the best interests of the parish."

R. J. Phillimore, J. D. Co'eridge, and Wintle showed cause.(a)—Stat. 3 & 4 Vict. c. 86, s. 3, enacts "That in every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as *having offended against the said laws, it shall be lawful for the Bishop of the [*211 diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report: Provided always, that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue." The other side must contend that it is competent to any person whatever, perhaps a person not even a subject, residing in any part of the kingdom, whatever his position and moral character, by charging a clerk in holy orders with an ecclesiastical offence, to compel the Bishop to issue a commission. Now, in the first place, the Bishop, under sect. 3, has in all cases a discretion whether he will issue a commission or not. In the second place, Mr. Golightly is not a proper party to apply for the issuing of a commission in this particular case: and therefore this Court, even if it should hold that the Bishop has no discretion where the application is made by a party having a locus standi, may and will refuse to issue a mandamus in the present case. As to the first point: the words in sect. 3 are, "it shall be lawful" for the Bishop to issue a commission "on the application of any party complaining;" "or if he shall think fit of his own mere motion." The words *"it shall be lawful" may or may not imply a dis- [*212 cretion. They are used in other parts of the Act, in sects. 4, 6, 9, 13, for instance; in some of which they must be considered as leaving no discretion, and in others of which they undoubtedly give it. The other side will probably rely on *MacDougall v. Paterson*, 11 Com. B. 755 (E. C. L. R. vol. 73), (in which the Court of Common Pleas dissented from the judgment of the Court of Exchequer in *Jones v. Harrison*, 6 Exch. 328†), and on *Crake v. Powell*, 2 E. & B. 210 (E. C. L. R. vol. 75), as authorities tending to show that the words in question make it imperative on the Bishop to issue a commission whenever the circumstances exist which, by the section, give him the power to issue it. But every statute must be construed independently

(a) Tuesday and Wednesday, June 14th and 15th. Before Lord Campbell, C. J., Wightman, Erie, and Hill, Js.

of others not in *pari materia*: and, in construing this statute, it is necessary to consider, not only the language used, but the intention of the Legislature in passing the Act, and the state of the law before the Act was passed. The old form of instituting proceedings in the Ecclesiastical Court against a clerk in holy orders for ecclesiastical offences, was for the party complaining to apply to the Judge Ordinary to allow his office to be promoted against the accused: and it is therefore important to ascertain whether it was compulsory on the Judge, in such case, to allow his office to be promoted. Now, there is no canonist who has laid down that it was imperative on the Judge to do so. Ayliffe, in his *Parergon Juris Canonici Anglicani*, p. 398, says: "It has been already noted, that the Judge's office is sometimes put in the place of an action, and hence I infer the Judge's office and an action to be two different things in propriety of speech. For an *213] action accrues to the party, *and is a right of prosecuting in judgment that which is due to him: but the Judge's office accrues only to the Judge, though he may sometimes lend it to the party upon humble request; and though it be not the same as an action, yet herein it has the similitude thereof." In Conset's *Practice of the Spiritual or Ecclesiastical Courts*, part VII., c. 2, p. 388 (3d ed.), it is said: "If any hath committed any crime (whereof the spiritual Courts have cognizance) and is not detected, denounced, or presented for the same, or if the Bishop or Archdeacon have not proceeded against him by way of inquisition: yet any person (who offers himself ready to pay the party to be convened his charges, if he doth not prove the matters objected), hath interest voluntarily to implore and promote the office of the Judge, and may call the delinquent to answer articles, and may administer articles to him, when he appears, in the name of the Judge, and of his office promoted, and may accuse the delinquent." In Oughton's *Ordo Judiciorum*, vol. I., tit. CL., pl. 1, p. 225, a similar passage (being, in fact, little more than a translation of the passage in Conset) occurs. None of these authorities support the proposition that the Judge was bound to allow his office to be promoted upon application by any party; or that he had not a discretion in the matter, even if the application were made by a proper party. *H. M. Procurator-General v. Stone*, 1 Hagg. Cons. C. Ca. 424, will probably be relied on as an authority the other way. Sir William Scott, in his judgment, says, "it is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one, who is desirous to avail himself of it, in a proper *214] case." But there it is *assumed that the application proceeded from a proper quarter: and, moreover, the power of the Bishop had been handed over to the Court, and all that the Court said was, that he could not intervene at that stage. So, in *Ex parte Medwin*, 1 E. & B. 609, 615 (E. C. L. R. vol. 72), where the Bishop was the promoter of a suit in the Consistorial Court of the diocese, and a prohibition was moved for, on the ground of his being interested, the Court of Queen's Bench, in giving judgment, says, "The" [Consistorial] "Court, therefore, is in style the Bishop's Court, as this is the Queen's: and the Chancellor is the Bishop's Chancellor, as we are the Queen's Judges. By a special provision, at the prayer of the party, the Bishop's judgment may be invoked; in which respect the analogy

fails. But, when this prayer is not made, the Chancellor, or Official Principal, seems to be an independent Judge: nor is he the less so, because some cases are excepted from his jurisdiction, nor because that jurisdiction ceases, or is suspended, when the Bishop is present. If absent, the Bishop cannot interfere: the parties are supposed, by the citation, or other proceedings, to be before him; nor is there any appeal from the Chancellor to him." In *Maidman v. Malpas*, 1 Hagg. Cons. C. Ca. 205, 209, where the office of the Judge had been promoted by the rector of a parish against a person for erecting a monument in the church without a faculty, Sir William Scott, in giving judgment, says: "A former citation was taken out in this case, from which the party was dismissed in consequence of a rule which the Court had laid down, and which had been intimated on former occasions, that the leave of the Court should be first obtained; since it is a part of the ecclesiastical *jurisdiction, which is not to be exercised without discretion, or to be left entirely to the judg. [*215 ment or passions of private persons." Again, in *Lee v. Mathews*, 3 Hagg. Eccl. R. 169, 174, the Court held that in "a case of office, the whole transaction should have been fairly and candidly stated at once, in order, first, that the Judge might have an opportunity of considering whether, both parties being involved *pari delicto*, he ought to allow his office to be promoted;" evidently assuming that the Judge had a general discretion whether he should allow his office to be promoted or not. And the same view is taken by the Court in *Bluck v. Rackham*, 5 Moore P. C. C. 305, 311, where it is said, "A criminal suit" [in the Ecclesiastical Courts] "commences by obtaining the permission of the Judge to promote his office." In *Ex parte Denison*, 4 E. & B. 292, 313 (E. C. L. R. vol. 82), this Court says "the Legislature has thought it inexpedient, where the Bishop is the patron, to leave it entirely in the discretion of the Bishop whether proceedings shall be instituted against the incumbent or not." The Court, therefore, assumed that at all events some amount of discretion was given to the Bishop. So, in *Regina v. Archbishop of Canterbury*, 6 E. & B. 546 (E. C. L. R. vol. 88), where it was held that the Archbishop, having issued a commission, on the application of an incumbent within a diocese in the province, against an incumbent within that diocese, which commission reported that there was *prima facie* ground for proceedings, was bound, if the complainant chose to proceed, to hear the cause, it seems to have been assumed by the Court that the Archbishop had, in the first instance, a discretion as to whether he would issue a commission or not. The intention of stat. 3 & 4 Vict. c. 86, to give a discretion to the Bishop, is *shown by [*216 the following passage in the report of the Ecclesiastical Commissioners in 1832, p. 57. "With respect to the tribunal which we recommend, we may remark that it will restore to the Bishops that personal jurisdiction which they originally exercised, and which was afterwards delegated by them to their Chancellors and officials." Then, if the Bishop had a discretion, he has exercised it; and this Court will not enter into the question whether that discretion was rightly exercised: *Rex v. The Justices of Cumberland*, 1 M. & S. 190 (E. C. L. R. vol. 28), *Regina v. Hale*, 9 A. & E. 339 (E. C. L. R. vol. 28).

Secondly, even assuming that the Bishop has no discretion when the application is made by a proper party, the applicant here had no locus standi: the Bishop, therefore, was entitled to refuse the application; and this Court will not issue a mandamus commanding him to entertain it. Mr. Golightly is a stranger to both the parish and the diocese, and had no such interest in making the application as the Bishop could recognise. "Any party complaining," in sect. 3, must mean, any party having an interest; in accordance with the general rule that the relief of a Court cannot be claimed by a stranger, having no interest in the relief claimed: *In re Masters, &c.*, of the Bedford Charity, 2 Swanst. 470, 518, Tapping on Mandamus, p. 29. However frivolous the application for a commission might turn out to be, the Bishop would have to pay the costs of issuing the commission, there being no power to compel the applicant to pay them: that is a strong argument in favour both of the contention that the Bishop has a discretion, and also that, where he has exercised it, the Court will not review his decision.

*217] **Bovill, Swabey, and G. R. Clarke, contra.*—First, the Bishop had no discretion as to issuing the commission. The language of stat. 3 & 4 Vict. c. 86, s. 3, is consistent either with an imperative obligation to do so, or with a discretion. *Macdougall v. Paterson*, 11 Com. B. 755 (E. C. L. R. vol. 13), and *Crake v. Powell*, 2 E. & B. 210 (E. C. L. R. vol. 75), are, to some degree, authorities for the latter view, being decisions on analogous language in the County Courts Extension Act, 13 & 14 Vict. c. 61; and *Rex v. Barlow*, 2 Salk. 609, *Rex v. The Steward, &c.*, of Havering Atte Bower, 5 B. & Ald. 691 (E. C. L. R. vol. 7), and *Regina v. Tithe Commissioners*, 14 Q. B. 459 (E. C. L. R. vol. 68), are authorities to the same effect. It is therefore material to ascertain whether the Bishop had a discretion to refuse an application for the promotion of the office of the Judge, the old form of proceeding for which proceedings under stat. 3 & 4 Vict. c. 86, are now substituted, to the exclusion, by sect. 23, of all others. Ayliffe, in his *Parergon*, p. 396, says, that the office of the judge is of two kinds: the "noble office," which may be exercised either by the judge himself, *mero motu*, for the advantage of the public, or at the instance of a private individual, for the redressing of a private grievance; and the "mercenary" or "promoted" office; "which does not subsist of itself, but is a servant to some civil action," and is called mercenary "because the office of the judge, being here (as it were) hired and employed to the advantage of a private man, is at another's beck to serve his turn." Now there is no instance of this mercenary, or promoted, office of the judge being refused. In *Lee v. Mathews*, 3 Hagg. Eccl. Rep. 169, the matter in dispute was of a private character and the Judge recommended a settlement. And the

*218] passage relied upon in Sir William Scott's judgment in *Maidman v. Malpas*, 1 Hagg. Cons. C. Ca. 205, 209, which, moreover cannot be considered as more than a dictum, would appear to refer, not to the Bishop's discretion in allowing the office of judge to be promoted where an ecclesiastical offence had been committed, but to his discretion in deciding whether such an offence had been committed or not. The Bishop, no doubt, gave his assent; but that was merely a matter of form, if he was satisfied that an ecclesiastical

offence had been committed. *Bluck v. Rackham*, 5 Moore P. C. C. 305, is no authority for any larger amount of discretion in the Bishop than this. The passages cited from *Conset* and *Oughton*, speaking of the office of the judge being "implored," are authorities in favour of the contention that the Bishop had no discretion; the application by the party complaining being merely a formal step for procuring the permission of the Bishop, provided that the matter were one of ecclesiastical cognisance, and that the party complaining made himself responsible for costs. In *Carr v. Marsh*, 2 Phill. Eccl. Rep. 198, 204, Sir John Nicholl, in giving judgment, says, "Application is always made to the judge before a citation issues in a cause in which his office is promoted: but that is not for the purpose of considering the merits of the case; but from the nature of the suit—whether it be of ecclesiastical cognisance, or the fitness of the person to be made responsible for costs to the other party." And *H. M. Procurator-General v. Stone*, 1 Hagg. Cons. C. Ca. 424, is a direct authority to the same effect. In a note to *Turner v. Meyers*, 1 Hagg. Cons. C. Ca. 414, the Court is represented as having said, on another occasion, "The criminal suit is open to every *one, the civil suit to every [*219 one showing an interest." So, in *Ditcher v. Denison*, (a) Dr. Lushington, in giving judgment, says, "It is perfectly clear, that if a Bishop under this statute think fit to do so, he is entitled, in the exercise of his discretion, to direct proceedings to be commenced of his own mere motion. But it is not so in regard to an application made to the Bishop.' If it were so, the ancient law of the Church would have been subverted by this statute. Lord Stowell, in the case of *H. M. Procurator-General v. Stone*, 1 Hagg. Cons. C. Ca. 424, 425, uses these words: 'It is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one, who is desirous of availing himself of it, in a proper case.' That proposition does not stand on the authority of Lord Stowell only, but is confirmed by that of Sir John Nicholl. What would happen if the Archbishop or the Bishop had a purely discretionary power to order proceedings to be begun or not, according to his own judgment, or according, I may say, to his own fancy? Why, that in every case it would rest entirely on the authority of a single Bishop either to permit a prosecution to be instituted on account of unsound doctrine, or on account of immoral conduct, or, if he chose, wholly to prevent any inquiry from taking place, and any charge, however grave, from being considered; the consequence of which would be, that the uniformity which now happily prevails among the clergy of this country might be destroyed and put an end to." The Bishop, then, having, under the old law, no discretion, and the language of the Act, which substitutes the new form of proceeding, being consistent with his *having no further discretion now, that construction of the [*220 Act should be adopted. And that construction is in accordance with the object of the Act, which is "for better enforcing Church discipline." Moreover, the words in the latter part of sect. 3, "or if he shall think fit, of his own mere motion," tend to show that, in the earlier part of the section, relating to the issuing of a commission upon complaint made, where no such words are used, it

(a) A report of this judgment was published by Seeley & Co., Fleet Street, in 1856.

was not intended to give the Bishop a discretion. And, in sect. 13, where a discretion is given to the Bishop to send the cause to the Court of Appeal for the province, the words "if he shall think fit" are introduced.

Secondly, Mr. Golightly was entitled to make the application. Conset and Oughton state that "any person," "quælibet persona," may apply. In *Com. Di. Visitor* (A. 13), the passage from Oughton is cited in support of the statement that a stranger may promote the office of the judge. Sir William Scott, in *H. M. Procurator General v. Stone*, 1 Hagg. Cons. C. Ca. 424, 425, takes the same view, and says that the Bishop cannot refuse the process of the Court "to any one, who is desirous of availing himself of it, in a proper suit." And in *Burgoyne v. Free*, 2 Hagg. Eccl. Rep. 456, the promoter appears to have been a stranger to the parish and the diocese in which the party complained against resided. In *Mastin v. Escott*, 2 Curt. 692, the promoter was a dissenter. *Argar v. Holdsworth*, 2 Phillimore's Reports of Sir J. Lee's Judgments 515, is an authority that any one may promote articles against a clergyman for neglect of his clerical duty. And in *James v. Boston*, 2 Car. & K. 4 (E. C. L. R. vol. 61), it was held that a charge against an incumbent by a person living out of the district, was a privileged communication *221] under sect. 8 of the Act in question.

Cur. adv. vult.

The following judgments were now delivered.

HILL, J.—This was a rule calling upon the Bishop of Chichester to show cause why a mandamus should not go, commanding him to issue a commission, under stat. 3 & 4 Vict. c. 86, s. 3, against the Rev. Richard William Randall, rector of Woollavington cum Graffham, in the county of Sussex and diocese of Chichester. The rule was obtained on behalf of the Rev. Charles Portales Golightly, of 6, Holywell Street, Oxford, a clerk in holy orders, who was not shown to have any connection with the before-mentioned parish, or with the diocese of Chichester, or to be in any sense a party aggrieved by the alleged offences charged against Mr. Randall. The charge made against Mr. Randall had reference to certain practices and doctrines which it was alleged that he put in use and taught in his parish, contrary to the laws ecclesiastical. Several questions of considerable importance were debated before us on the argument of the rule. In showing cause against the rule, it was argued that it was discretionary with the Bishop whether he would issue a commission or not, under stat. 3 & 4 Vict. c. 86, s. 3. That, prior to the passing of that statute, it was a matter for the discretion of the Court or Ordinary whether a private individual should be allowed to institute a criminal suit in the Ecclesiastical Courts; and that such discretion was not taken away by the statute; and it was also argued that Mr. Golightly was not a *222] proper person to claim the interference of this Court. *On the other hand it was argued, in support of the rule, that, although it was necessary, prior to the statute of 3 & 4 Vict. c. 86, for a private person to obtain the permission of the Court or Ordinary before instituting a criminal suit in the Ecclesiastical Courts, yet that the obtaining of such permission was a mere matter of form; that two questions alone were inquired into, viz., whether the charge made was

one of ecclesiastical cognisance, and the fitness of the party proposed to be made responsible for the costs of the prosecution. That the statute, by the 28d section, having provided that no criminal suit against a clerk in holy orders for any offence against the laws ecclesiastical should be instituted otherwise than as provided by that statute, it was imperative on the Bishop to issue a commission upon the complaint of any party charging a clerk in holy orders with an offence against the laws ecclesiastical, and that it was no sufficient answer that the Bishop had inquired into the case and, in the exercise of his discretion, thought it inexpedient to do so. It was also argued that it was not necessary that the party complaining should have any interest in or connection with the diocese or parish in which the alleged offender held preferment, or in which the alleged offences were committed.

If it were necessary to give an opinion on the construction of the 3d section of the statute, I should have thought that the writ ought to issue, so that a question of such importance might be decided on the return in such manner that the judgment of the Court might be reviewed by a Court of error: and I am not satisfied that it is a mere matter in the discretion of the Bishop whether he will issue a commission or not, if a proper complaint be made by a party who is entitled to complain. *But it appears to me not necessary to give any opinion on the construction of the statute. This is [*223 an application to the discretion of the Court to issue the prerogative writ of mandamus. That the Court has a discretion whether the writ shall be issued or not, was distinctly recognised by Ashurst, J., in *Rex v. The Bishop of Chester*, 1 T. R. 396, 403. In the case before the Court, the party applying for a writ of mandamus is a total stranger to the diocese of Chichester, and in no way interested in the matter charged against Mr. Randall more than any other clerk in holy orders in the most remote part of the kingdom. I think it would be productive of the greatest inconvenience and mischief if this Court were to lend its aid to any stranger to compel a Bishop to issue a commission in any particular case, and that this Court ought not to interfere upon the application of a party who is not shown to be a party aggrieved, or to have some connection with the parish or diocese. On this short ground, therefore, I think the rule should be discharged.

WIGHTMAN, J.—This was a rule calling on the Bishop to show cause against a rule for a mandamus commanding him to issue a commission for the purpose of inquiry into certain charges against the Rev. R. W. Randall of offences against the laws ecclesiastical. It appeared, by the affidavits, that information had been given to the Bishop that the Rev. R. W. Randall, a beneficed clergyman in his diocese, had inculcated doctrines contrary to those of the Church of England, and in violation of the laws ecclesiastical. The Bishop, upon being informed of the charges, and having communicated with the accused, appears to have been satisfied that the charges were in part explained away; and, the accused having promised to [*224 abstain from any practices which the Bishop might think objectionable, the latter was of opinion that further proceedings were unnecessary, and calculated to bring disturbance and scandal into

the Church, and declined to issue a commission. Whether the Bishop's opinion was well or ill founded it is not for us to inquire; nor is it competent to us to consider questions of doctrine or matters purely ecclesiastical. The real question in the case is, whether the Bishop has any discretion in the matter; or whether, under the provisions of the Church Discipline Act, 3 & 4 Vict. c. 86, he is absolutely bound, without previous examination or inquiry himself, to issue a commission of inquiry, as directed by that statute, if any clergyman of his diocese is charged with an offence against the laws ecclesiastical, or against whom there may exist scandal or evil report as having offended against those laws. The statute recites that "the manner of proceeding in causes for the correction of clerks requires amendment," and repeals stat. 1 Hen. 7, c. 4, intituled, "An Act for Bishops to punish priests and other religious men for dishonest lives." By the third section of stat. 3 & 4 Vict. c. 86, it is enacted "that in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the Bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon *225] or rural dean within the diocese, *for the purpose of making inquiry as to the grounds of such charge or report: Provided always, that notice of the intention to issue such commission under the hand of the Bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue." It was contended, in support of the rule, that the words "it shall be lawful," in the 3d section of the Act, are to be construed as imperative upon the Bishop, and not as allowing him any discretion in any case; and that if a charge be made against a clergyman of an offence against the laws ecclesiastical, however little worthy of credit the charge may be, or if, in case of a well-founded charge, the clergyman should admit his error and promise avoidance of it for the future, the Bishop must, nevertheless, proceed to issue the commission and take the other steps prescribed by the Act consequent upon the issuing the commission: and this, although the person complaining as in this case, is a stranger to the diocese, and has really no personal interest in the matter. The same terms are used in the statute, and must be applied to the case of a clergyman against whom there is no charge by any one, but concerning whom there may exist scandal or evil report, as having offended against the laws ecclesiastical. The scandal or evil report may be entirely unfounded and vague; but if it be of an offence against the laws ecclesiastical, it is said that the Bishop must, by the terms of the third section, issue a commission of inquiry. I am, *226] however, of opinion that the *Legislature did leave a discretionary power in the Bishop as to the issuing a commission of inquiry; trusting to the due exercise of that discretion by the

Bishop in all cases where it appears to him that the interests of the church require it. There may be many cases in which neither the church nor the public would gain by the prosecution of such inquiries: vague and unfounded scandal might, by the intervention of over zealous, or interested, or prejudiced, or fanciful persons, become the ground for the most vexatious proceedings, and introduce disquiet and dissension where none existed before, or aggravate any that might exist. Before the passing of the statute, the office of Judge could not be promoted by private individuals for offences against the laws ecclesiastical without the previous leave of the Court. In the case of *Maidman v. Malpas*, 1 Hagg. Cons. C. Ca. 205, 209, a former citation, at the instance of a private prosecutor, for an offence against the laws ecclesiastical, was dismissed, because the leave of the Court to issue it had not been previously obtained: and Sir William Scott, in his judgment, says that the previous leave of the Court is a part of the ecclesiastical jurisdiction, which is not to be exercised without discretion, or left entirely to the judgment or passions of private persons: and in the case of *H. M. Procurator-General v. Stone*, 1 Hagg. Cons. C. Ca. 424, in the same volume, the same eminent Judge observes that the process of the Court is not to be refused in a proper case. It might be inferred from these dicta, and from the text books of practice in the Ecclesiastical Courts, that, before the jurisdiction given to the Bishop by the Church Discipline *Act, there was some [*227 restriction upon the commencement of the proceedings in the Ecclesiastical Courts for offences against the laws ecclesiastical; and that it was not a matter of course to allow the office of Judge to be promoted by any private individual who might think fit to institute a suit upon grounds entirely frivolous. It must, however, be admitted, that, in the case of *Carr v. Marsh*, 2 Phill. Eccl. Rep. 198, 204, it was said by Sir John Nicholl that, though application was always made to the Judge before a citation is issued in a cause in which his office is promoted, that is not for the purpose of considering the merits of the case, but to ascertain whether it is of ecclesiastical consusance, and the fitness of the person to be made responsible for costs to the other party. Other cases were cited with a view to show that, as the ecclesiastical law stood before the Church Discipline Act, there was no discretion in the Court as to granting or refusing to permit the office of Judge to be promoted upon any preliminary consideration of the merits, in the case of a charge of an offence against the law ecclesiastical. It is, however, to be observed that, whatever the law and practice of the Ecclesiastical Courts may have been upon this point, the office of Judge could only have been promoted in the case of some direct and positive charge of an offence against the laws ecclesiastical; and no proceeding upon the ground of the existence of scandal or evil report of having offended against those laws would have been admissible. The Church Discipline Act introduces a new course of proceeding, and authorizes the Bishop, in case of any one making a complaint against a clergyman, either of an offence or of *scandal and evil report against him of an offence against the laws ecclesiastical, or, if he shall see fit, of his own mere [*228 motion, to issue a commission of inquiry as to the grounds of such charge or report. Whether the complaint be of an actual offence, or

of scandal and evil report of an offence, the words of the statute as to the Bishop's exercise of authority are the same; and, according to all the rules of construction, grammatical or otherwise, are incapable of a different construction in the case of a complaint of scandal and evil report of an offence, from that which they would have in case of a complaint of an actual offence, giving a discretion in the first case, but none in the last. The language of the statute is such, that it seems clear that the Bishop either has a discretion which he may exercise in both cases, or that he has, as was contended, none in either, but that it is imperative upon him, whether the complaint be of an offence or of the existence of scandal or evil report of an offence against the laws ecclesiastical, to issue a commission of inquiry, though the complaint in the latter case may appear to the Bishop to be founded upon mere gossip, emanating from some perhaps well-meaning but fanciful and over zealous persons. I cannot think that such can have been the intention of the Legislature; but that it was intended, when this new mode of procedure was instituted, to invest the Bishops with a power to cause inquiry to be made in cases where it appeared to them that the interests of the Church and the public required it, and in the belief that such power would be duly and properly exercised whenever a proper case arose: and that it was better for the interests of religion and the public that the Bishop, who is the overseer or superintendent of religious matters in the Church, *229] should *be intrusted with a discretion as to the propriety of issuing a commission of inquiry in such cases, than that it should be left entirely, as expressed by Sir William Scott, to the judgment or passions of private persons, who, under the influence of zeal, or prejudice, or fancy, might call peremptorily upon the Bishop, without any real or substantial ground, upon mere scandal or evil report, to institute proceedings which would cause at once expense, trouble, and vexation, and tend to create disturbance and scandal in the Church.

I am, therefore, of opinion that the Bishop might exercise his discretion as to the propriety of issuing a commission in this case; and that the present rule for a mandamus should be discharged.

I regret that, in a case of so much importance, the present Lord Chancellor and the Lord Chief Justice of the Common Pleas, who were both members of this Court when the case was argued, (a) cannot be here to deliver their own opinions on the matter: but I am authorized by them both to state that they are of opinion that the present rule should be discharged.

Rule discharged.

(a) See page 210.

*230] **The Earl of DURHAM, Appellant, v. The Overseers of the Township of BISHOPWEARMOUTH, Respondents.*
July 2.

The port of S. extends from the bar at the mouth of the river W. and low-water mark of the sea, about eight miles up the river. It includes so much of the river as is within those limits. A parish and several townships are situated on the shores of the port, their respective river frontages extending *usque ad medium flum aquæ*. The Bishops of D. (the then owners of the whole soil and freehold of the port below low-water mark on each side of the river), their lessees or officers, set up beacons, placed, fixed, and maintained mooring-buoys, posts, and rings, and did other works within the port for the use and benefit of ships resorting thither, down to the passing of stat. 3 G. 1, c. iii., by which Commissioners were appointed for the river W., who have since had the entire control of the port, its beacons and moorings. The soil of the port between high and low water mark is, in some parts, owned by adjacent landowners. From time immemorial, tolls called "anchorage and beaconage," have been paid in the port to the Bishops of D. and their lessees; being 1s. 2d. paid for every ship entering the port. Every such ship necessarily passes and floats over part of the soil of the port, and may have to cast anchor therein, or to be moored to the moorings affixed and sunk in the river, or on the quays or shores adjacent. Ships paying this toll come into the said parish and the said townships on the port. Another and distinct toll is charged, by the private owners of the quays on both sides of the river, to all ships using mooring-posts set up on such quays by such owners. By lease dated 26th November, 1853, the Bishop of D. demised to appellant for twenty-one years, from 3d September, 1853, the port of S., together with, amongst other tolls collected therein, the anchorage and beaconage tolls. Appellant has ever since received these tolls. Stats. 6 & 7 W. 4, c. 19, and 21 & 22 Vict. c. 45, which transferred to the Crown many of the rights of the Bishop of D., left untouched the right of the Bishop and his lessees to these tolls. On 1st October, 1855, the estate of the Bishop of D. in the soil and freehold of the port of S. became vested in the Ecclesiastical Estates Commissioners. Appellant had never resided in the parish or any of the townships in question.

Held, on a case stated, which empowered the Court to draw inferences of fact: first, that the anchorage and beaconage tolls were not tolls in gross, but tolls connected with the occupation and use of the soil of the port; and were therefore rateable to the poor-rate in the parish and the townships on the port, into which the ships paying them came. Secondly, that such tolls were to be rated on a calculation of the number of ships paying the toll and coming into those parts of the port which were in the parish and the townships respectively, and ought not to be rated according to the respective river frontages or populations of the parish and the townships.

CASE stated under stat. 12 & 13 Vict. c. 45, s. 11. The township of Bishopwearmouth is situate in the county palatine of Durham, and is a township and district maintaining its own poor. By a rate duly made for the relief of the poor of the said township, the appellant was assessed at the sum of 100l., in respect of certain tolls or dues received by him under a lease hereinafter mentioned, dated 26th November, 1853, and granted by *Edward, the then Lord [*231 Bishop of Durham. Against this rate he appealed, on the ground that the said tolls or dues are not liable to be rated for the relief of the poor. No objection was to be taken to the form of the rate.

By an indenture of lease, made and dated 26th November, 1853 (and hereinafter sometimes described and referred to as "the said lease"), Edward, then Lord Bishop of Durham, demised to the appellant, for the term of twenty-one years, from 3d September, 1853, "All that his borough and town of Sunderland, nigh the sea, in the county of Durham, with all borough courts, perquisites of courts and borough rents, and other free rents, customs, duties, and profits belonging to the said borough, and all that his port, haven, and creek of Sunderland aforesaid" (hereinafter sometimes described and re-

ferred to as "the port"), "extending from the bar" (hereinafter described) "and low-water mark of the sea, unto the new bridge, nigh Limley Park, together with all anchorage, plankage, beaconage, wharfage, ballast shores, groundage, moorage, cranage, pickage, stallage, and poundage, with all privileges, liberties, conveniences, and commodities requisite and incidental thereto, and all sums of money, duties, benefits, and profits arising or anywise growing due to the said Bishop or his successors, for or in respect of any ship, vessel, or boat, coming into or going out of, or anywise arriving, anchoring, mooring, loading, or unloading at or in the said port, or any part thereof, and the benefits, profits, commodities, advantages, and appurtenances whatsoever, thereunto belonging, or in anywise appertaining."

A copy of this lease was to be referred to as part of the case. *232] Under this lease, the appellant is entitled to *and receives the tolls or dues in respect of which he is rated, which from time immemorial have been called anchorage and beaconage tolls, and which consist of an immemorial toll, due, or payment, called "anchorage and beaconage," of 1s. 2d. for and in respect of every British vessel which enters the port, and a like toll, due, or payment of 1s. 2d. for and in respect of every foreign ship which enters the port, which sum of 1s. 2d., for and in respect of every foreign ship which enters the port, is part of an immemorial toll, due, or payment of 2s. 4d., payable for and in respect of every foreign ship which entered the port; but which, several years ago, in consequence of certain reciprocity treaties with foreign powers, was (in practice) reduced to 1s. 2d., being the same amount as is payable in respect of British ships. The Bishops of Durham, in right of their see of Durham, were, from, if not previously to, the time of the Norman Conquest, counts palatine of the county palatine of Durham, and within that county had royal rights and powers, until stat. 6 & 7 W. 4, c. 19, entitled "An Act for separating the palatine jurisdiction of the county palatine of Durham from the Bishopric of Durham;" by sect. 1 of which it is enacted, "That from and after the commencement of this Act" (i. e., 5th July, 1836), "the Bishop of Durham for the time being shall have and exercise episcopal and ecclesiastical jurisdiction only; and that from and after the commencement of this Act, the palatine jurisdiction, power, and authority heretofore vested in and belonging to the Bishop of Durham shall be separated from the Bishopric of Durham, and shall be transferred to and vested in His Majesty, his heirs and successors (as a separate franchise and royalty), in the same and as ample *233] a manner in all respects as the same *has been heretofore exercised and enjoyed by the Bishop of Durham;" "and all jura regalia" "which, if this Act had not passed, would or might belong to the Bishop of Durham for the time being, in right of the county palatine of Durham, shall be vested in and belong to His Majesty and his successors in right of the same." By sect. 9 of the same Act, the rights of the Bishop to any lordships, manors, rents, profits, and emoluments of any description held in right of the Bishopric, or in right of the said county palatine, are expressly reserved, save any profits and emoluments in the Act expressly mentioned and directed to be severed therefrom; and the tolls in question are not expressly mentioned in the Act, and directed to be severed. By stat.

21 & 22 Vict. c. 45 (which received the Royal assent on 23d July, 1858, and which Act was to be referred to as part of the case), after reciting that amongst the jura regalia claimed by the Bishop of Durham, previously to and at the time of the passing of stat. 6 & 7 W. 4, c. 19, was the right to the beds and shores of navigable rivers so far as the tide flows and reflows therein, within the county of Durham; and that doubts were entertained, with respect to the said claim, and with respect to the construction of the said Act, how far such right was or had thereby become vested in Her Majesty; and further reciting that doubts had also arisen how far some portions of the said beds and shores of the said navigable rivers do or do not belong to the said see of Durham, as parcel of some or one of the manors, seigniories, or possessions appertaining thereto; it is enacted, by sect. 2, that "All the estate, right, title, and interest of or to which Her Majesty the Queen is seised or entitled, in right of the said county palatine, and also all the estate, right, title, and interest *whatsoever of or to which the Bishop of Durham was, at the [*234 time of the passing of" stat. 6 & 7 W. 4, c. 19, "or of or to which the said Bishop or the Ecclesiastical Commissioners for England now is or are seised or entitled, either in right or as part or parcel of the county palatine or see of Durham, or of any lordship, manor, or seigniority forming part of the possessions of such see or county palatine respectively, in and to the soil and freehold of the beds and shores of navigable rivers, so far as the tide flows and reflows" "within or adjacent to the county of Durham," "is and are by this Act transferred to and vested or declared to be vested in the Queen's most excellent Majesty, her heirs and successors, as part of the hereditary possessions and land revenues of the Crown," "subject nevertheless to any leases now affecting the same premises or any part thereof."

The port demised to the appellant by the said lease is formed by the river Wear, at and across the mouth of which is a bar. The port extends in length from the said bar and low-water mark of the sea to the new bridge near Limley Park, a distance of eight miles, and includes so much of the river as is within those limits. The north shore of the river is formed by the townships of Monkwearmouth Shore, Monkwearmouth, and Southwick (each maintaining its own poor), and by other parishes and townships (also respectively maintaining their own poor), between them and the said bridge. Monkwearmouth Shore is next the sea, and next to it is Monkwearmouth, and then Southwick. The townships of Monkwearmouth Shore, Monkwearmouth, and Southwick, and the other townships and parishes, extend from the north side of the river usque ad medium filum aquæ. The south shore of the river is formed by the parish of Sunderland, *by the townships of Bishopwearmouth and [*235 Bishopwearmouth Panns, and by other townships (respectively maintaining their own poor) between them and the said bridge, also a distance of eight miles. The parish of Sunderland was formerly a township of and formed part of the parish of Bishopwearmouth: but was by statute, entitled "An Act for making the town and township of Sunderland a distinct parish from the parish of Bishop-

wearmouth, in the county of Durham," passed in the year 1719,^(a) formed into a separate parish, and has ever since maintained and now maintains its own poor. The townships of Bishopwearmouth and Bishopwearmouth Panns were and are within the parish of Bishopwearmouth, and support their respective poor. The parish of Sunderland is next the sea, and next to it is the township of Bishopwearmouth Panns, and then the township of Bishopwearmouth. The parish of Sunderland and the townships of Bishopwearmouth Panns and Bishopwearmouth, and the other townships, extend from the south shore of the river usque ad medium filum aquæ, the aggregate river frontage of the parish of Sunderland and the townships of Bishopwearmouth Panns and Bishopwearmouth being three miles. From time immemorial, until on or about 18th October, 1855, when the late Bishop of Durham surrendered the estates of the bishopric to the Ecclesiastical Estates Commissioners, the Bishops of Durham, and from that time the said Commissioners, have been owners of and entitled to the aforesaid matters and premises above mentioned to have been demised to the appellant by the said lease, except so far as

*236] the ownership in the aforesaid matters and *premises has been affected by stats. 6 & 7 W. 4, c. 19, and 21 & 22 Vict. c. 45, before mentioned. For the purposes of the case it was admitted that, except so far as affected by the said Acts, the Bishops of Durham, from time immemorial until on or about 1st October, 1855, and from that time the said Commissioners, have been owners of the whole soil and freehold of the said port, between low-water mark on the one side and low-water mark on the other side, the adjacent owners having in some parts been the owners of the soil of the said port between high and low water marks. The proprietors of the quays on both sides of the river have fixed and set up mooring-posts upon such quays, and charge and receive tolls or compensation from all ships using such mooring-posts; but these tolls are wholly different from the tolls in question. Every ship entering the port must necessarily pass and float over, and may have to cast anchor therein, or to be moored to some moorings affixed and sunk in the river, or on the quays or shores adjacent. It was admitted, for the purposes of the case, that, before the passing of the private Act, 3 G. 1, c. iii., entitled "An Act for the preservation and improvement of the river Wear, and port and haven of Sunderland, in the county of Durham," the Bishop of Durham and his lessees maintained the beacons and moorings in the river Wear. By that Act Commissioners were appointed for the river Wear, and such Commissioners have since been continued under that Act and subsequent Acts passed for the amendment or renewal thereof. These Acts were to be referred to as part of the case. Since the passing of stat. 3 G. 1, c. iii., neither the Bishops nor their lessees have in any way occupied, used, or interfered with the said river or the soil thereof, or the beacons or the moorings thereof,

*237] *except by receiving the said tolls, as mentioned in this case; but the said river and its beacons and moorings have been conducted and managed by the said Commissioners; and where, between high and low water marks, the soil of the river has belonged to the adjacent owners, the Commissioners of the river Wear have

(a) Stat. 5 G. 1, c. xix. Local and personal, private.

still thereon put down moorings for the use of ships. The appellant has never appointed a water-bailiff or any other officer, under or by virtue of the said lease; but, previous to the said Act, 3 G. 1, c. iii., his ancestors, previous lessees, it is believed, did. The appellant has never held borough Courts, or received any rents, customs, dues, or profits belonging to such Courts; but his immediate ancestor, the next preceding lessee, the late Earl of Durham, who died in the year 1840, on one or two occasions did hold a borough Court. Ships entering the port rarely, except for the purpose of being laid up for the winter or of being repaired, proceed to or use any part of the port, except the parts thereof within the townships of Monkwearmouth Shore, Monkwearmouth and Southwick, on the north side, and the parish of Sunderland and the townships of Bishopwearmouth and Bishopwearmouth Panns, on the south side; and the whole of the tolls (except a very small proportion), in respect of which the appellant has been rated as aforesaid, are in respect of ships proceeding to the parts of the port within those townships and that parish. The tolls in question, along with others, were, it is believed, very many years since, collected by water-bailiffs and other officers appointed by the Bishops of Durham, but were afterwards demised by the Bishops to different persons; and, for several years next preceding the date of the said lease to the appellant, were demised by different Bishops of Durham to the *appellant's ancestors, by leases [*238 similar to the said lease to the appellant. By these lessees the tolls in question have been duly collected for many years past. They have been paid to Joseph Simpson, who is the collector of the light-house duties at the port of Sunderland, but who receives the tolls on behalf of the appellant; and, as Mr. Simpson has an office at the custom-house of the port, which is situate in the parish of Sunderland, the tolls have been paid to him at his office there; but the appellant does not occupy such office, except as thus occupied by Mr. Simpson; nor is Mr. Simpson the servant of the appellant, otherwise than as collecting these tolls, for which he receives a per centage on the amount collected. It was, for the purposes of the case, admitted that, previously to the appointment of such Commissioners as hereinbefore mentioned, but very many years since, the port and the affairs and business thereof were managed and conducted by the Bishops of Durham, or their lessees, under leases similar to the said lease, or by officers or others in that behalf authorized, appointed, or employed by such Bishops or lessees; and, by such Bishops, lessees, or officers, beacons were set up, mooring-buoys, posts, and rings were placed and fixed within the port, for the use and benefit of ships and vessels entering the port; and other works were done for the maintenance of the port, and the use and benefit of the ships resorting to it. It is not known when the tolls were first rated in any parish or township, but a Mr. Lambton, an ancestor of the appellant, was, in the year 1771, rated for these tolls to the relief of the poor in the said parish of Sunderland. The words of description in the rate alluded to are "anchorage and beaconage, per Mr. Fenwick, steward to Mr. Lambton." It is, *however, believed that these tolls [*239 have been regularly rated down to this time, in that form, since 1719, when the said parish of Sunderland was severed from the

said parish of Bishopwearmouth. Save in the said parish of Sunderland, these tolls were never rated for the relief of the poor, until the year 1852. In that year the ancestor of the appellant, who was then the lessee of these tolls, appealed against the rate for the said parish of Sunderland, but abandoned the appeal and agreed with the overseers to be rated on 150*l*. Immediately afterwards, the townships of Bishopwearmouth, Bishopwearmouth Panns, Monkwearmouth, Monkwearmouth Shore, and Southwick, rated these tolls. The appellant has never resided in any of the said townships or parish in which he is so rated in respect of the said tolls, but he is rated in the township of Bishopwearmouth in respect of certain railway and shipping staiths occupied by him. The Court was to be at liberty to draw such inferences of fact as might be drawn by a jury upon a trial at Nisi Prius, and also might cause the case to be amended in any manner that the Court might think proper.

The appellant, in respect of the tolls in question, is rated as follows:—

	£	s.	d.
In the township of Bishopwearmouth, at . . .	100	0	0
In the township of Monkwearmouth Shore, at . . .	110	0	0
In the township of Monkwearmouth, at . . .	20	16	8
In the township of Southwick, at . . .	7	6	8
In the parish of Sunderland, at . . .	150	0	0
In the township of Bishopwearmouth Panns, at . . .	15	0	0
	<u>£403</u>	<u>3</u>	<u>4</u>

*240] *No rate in respect of the said tolls had ever been made for the relief of the poor of any other township or parish except Sunderland, Bishopwearmouth, Bishopwearmouth Panns, Monkwearmouth, Monkwearmouth Shore, and Southwick. The estimated frontage to the river, the population according to the census of 1851, and the amount of the present rateable value of hereditaments, rateable to the relief of the poor of the said parish of Sunderland, and the townships of Bishopwearmouth, Bishopwearmouth Panns, Monkwearmouth, Monkwearmouth Shore, and Southwick, was as follows:—

	Frontage.	Population.	Rateable Value.
			£ s. d.
Parish of Sunderland - - - -	$\frac{1}{2}$ mile	19,058	34,588 10 0
Township of Bishopwearmouth - - -	2 miles	31,527	108,844 0 0
Township of Bishopwearmouth Panns - -	$\frac{1}{2}$ mile	310	1,647 10 0
Township of Monkwearmouth - - -	$\frac{1}{2}$ mile	3,228	5,739 13 8
Township of Monkwearmouth Shore - -	$\frac{1}{2}$ mile	10,063	21,257 10 0
Township of Southwick - - - -	1 mile	2,721	8,237 16 10

For the purposes of the case it was admitted that if the appellant was rateable for the tolls in question, the sum of 403*l*. 8*s*. 4*d*. was the correct amount.

The appellant had appealed against all the above rates; but it had been agreed that the appeal against the rate for the township of Bish-

opwearmouth should be proceeded with, and the present case stated, so as to obtain the decision of the Court on the whole.

The questions for the opinion of the Court were, first: Are the said tolls rateable to the relief of the poor in all, or any, or which of the said townships or parish? Secondly: If rateable in more than one of the said townships or parish, then on what principle is the said sum of 403*l.* 3*s.* 4*d.* to be apportioned?

* *Welsby*, for the respondents.(a)—The tolls in question are [*241 rateable. No doubt, were they tolls in gross, they would not be rateable. But they are not tolls in gross. The right to take them is connected with the use and occupation of land: which land is, consequently, liable to an additional rate in respect of such right. By the lease of November, 1858, the Bishop of Durham, the owner of the soil, demised to the appellant the soil of the port, in the respondent and the other townships, between low-water mark on each side, together with the tolls payable for the use of it. The tolls, therefore, are not severed from the soil. They are payable in respect of every vessel which enters the port; and as every vessel entering the port must necessarily pass and float over the soil, and may have to cast anchor on it, or to be moored to some moorings affixed to and sunk in it, the payment must be presumed to be made in respect of such possible use of the soil. The other side will rely on *Rex v. Coke*, 5 B. & C. 797 (E. C. L. R. vol. 11), where passing tolls, paid by ships to a lighthouse, were held not to be rateable to the poor-rate. But those tolls were not paid in respect of the use and occupation of the lighthouse: moreover, as is pointed out in *Attorney-General v. Jones*, 1 McN. & G. 574, the ground of the decision was that they were taken from vessels which did not come within the precincts of the parish imposing the rate. In *Regina v. Hull Dock Company*, 7 Q. B. 2 (E. C. L. R. vol. 53), it was held that the Company was liable to be rated for all the tonnage duties they received from ships entering the basin or docks, which belonged to them and were erected upon *their land; but not for such duties as they received from [*242 ships merely entering the harbour and other parts of the port, which were not their property. That case shows that the test of the rateability of such tolls is whether or not they are paid for the use of the soil. In the present case, the tolls have been paid for the use of the soil from time immemorial; and have not been severed from the soil by any of the enactments set out in the case. As constituting part of the annual profits of land occupied by the appellant in the respondent township, they are clearly rateable in the parish of Sunderland and all the five townships in which they are now rated; into all of which ships paying the toll come.

Atherton, contra.—The toll is a single and indivisible toll for “anchorage and beaconage,” enjoyed by the appellant quite independently of his enjoyment of the soil of the port; although it is true that he acquired the right to the toll by the same lease which gave him possession of the soil. Many of the ships which pay the toll anchor on the portion of the soil between high and low water mark; and the case finds that this portion forms no part of the land demised, but belongs to different owners, who impose another toll upon ships for

(a) Saturday, June 4th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, J.

its use. "Anchorage" is defined by Lord Hale, in his work *De Portibus Maris*, part 2, chap. 6 (Hargrave's Collection of Law Tracts, vol. I., p. 74), as follows: "Anchorage, or a prestation of toll for every anchor cast there; and sometimes though there be no anchor. And this doth in truth properly and *primâ facie* arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise; for many times where the shore of a harbour belongs to a private lord *243] or owner, yet if at full sea a *ship lets fall an anchor upon that place, the king or lord of the port in point of franchise hath usually the anchorage." This passage shows that the right to anchorage toll may be severed from the ownership of the soil. [Lord CAMPBELL, C. J.—No doubt, the right may be so severed. But in cases where the same person takes the tolls and holds the soil, is not the presumption the other way?] So much of the soil as lies between high and low water mark is not held by the appellant, and other persons take toll for the use of it. But it is not to be presumed that the franchise of the port accrued to the Bishops of Durham from the mere ownership of the soil of the port. They acquired the soil of the port as a *jus regale*, but can have derived the right to take tolls in the port only from a distinct grant by the Crown. Again, it is said by the other side that these tolls are part of the profits derived by the appellant from the occupation of the soil. But, for that to be so, the profits accruing from the tolls ought to be coextensive with the use of the land; whereas the tolls are payable by all ships entering the port, whether or not they make any use of so much of the soil of it as is leased to the appellant. [Lord CAMPBELL, C. J.—But, by payment of the toll, ships obtain a right to anchor in any part of the port that they think fit.] The fact that the ships, though paying him toll, may possibly make no use of the appellant's soil, brings the case within the principle of the decision in *Lewis v. Overseers of Swansea*, 5 E. & B. 508 (E. C. L. R. vol. 85). There tolls and dues were payable to the corporation of Swansea in respect of all goods landed on, or shipped from, quays and wharfs on a part of the shore of the harbour *244] within the borough, *some of which were the property of the corporation and occupied by them or their lessees, and others were the property of a private owner. It was held that these dues were not paid in respect of the use of land, but were incorporeal and in gross; and that neither the corporation, nor any one to whom the dues were let by the corporation, was rateable to the poor-rate in respect of any of the dues. Wightman, J., in his judgment in that case says, "The toll is taken without any distinction as to the occupation of the land which is used for the carriage of the goods: and it is a mere accident that the corporation are the occupiers of a portion of the land." So, in the present case, it is a mere accident that the right to the tolls and the right to the greater part of the soil of the port are united in the appellant. The lease of November, 1853, in which the tolls are demised separately from the land, includes in the demise some tolls which are, necessarily, connected with the use of the soil, "pickage and stallage" for instance. Such tolls, and such only, are rateable: *Roberts v. Overseers of Aylesbury*, 1 E. & B. 423 (E. C. L. R. vol. 72). Further, the case finds that the toll is a single and indivi-

sible toll, called "anchorage and beaconage;" there is but one payment made in respect of it. Now "beaconage" is, clearly, not connected with the use of the soil: *Com. Di. Navigation* (H); and is therefore not rateable: *Rex v. Coke*, 5 B. & C. 797 (E. C. L. R. vol. 11).

Welsby, in reply.—The case finds that the Bishops of Durham were, from time immemorial, owners of the whole soil and freehold of the port, except in certain parts where the adjacent owners are owners of the soil between high *and low water mark. It is [*245 evident, therefore, that every ship entering the port must necessarily pass over some part of the soil owned by the Bishop and demised by him to the appellant. Moreover, it is found that the adjacent owners take a separate toll, distinct altogether from that paid to the appellant, from all ships using the mooring-posts set up by them. As, then, those persons take that toll in respect of the use of their soil, it is equally reasonable to suppose that the toll which the appellant takes is levied in respect of the use of so much of the soil as is vested in him.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of the Court.

In answering the first question, whether the tolls are rateable, we are to consider whether they are tolls in gross, or tolls connected with the occupation of the soil: and this must be determined in the same manner as if the nature of the tolls had been discussed when they were received by the Bishop of Durham or his lessee, before stats. 3 G. 1, c. iii., 6 & 7 W. 4, c. 19, and 21 & 22 Vict. c. 45; none of these statutes having severed the tolls from the soil, if they ever were connected together. According to the statement in the case, these tolls have always been taken in respect of ships entering and using the port of Sunderland. This port begins on crossing the bar at the mouth of the river Wear; extends to a bridge near Limley Park; comprehends the whole space of the river from low-water mark on the north side to low-water mark on the south side; and is in the several contiguous parishes or townships on both sides, usque ad medium filum aquæ. The Bishop was the owner of *the soil [*246 and freehold of the said port between low-water mark on the one side and low-water mark on the other side. Every ship entering the port may have to cast anchor therein, or to be moored to some moorings affixed to the river, and sunk in the river or on the quays and shores adjacent. The Bishop and his lessees maintained the beacons and moorings in the river Wear. Previously to the appointment of Commissioners, the port, and the affairs and business thereof, were managed and conducted by the Bishops of Durham, or their lessees, under leases similar to that granted to the appellant; or by officers or others in that behalf authorized, appointed, or employed by such Bishops or lessees: and by such Bishops, lessees, or officers, beacons were set up, mooring-buoys, posts, and rings were placed and fixed within the port for the use and benefit of ships entering the port, and other works were done for the maintenance of the port and the use and benefit of the ships resorting to it. The tolls rated have been paid immemorially to the Bishop or his lessees, and have been called "anchorage and beaconage tolls," being 1s. 2d. for and in respect of every British ship which enters the port: and formerly

double that sum was paid, and now, by Act of Parliament, in consequence of reciprocity treaties, the same sum is paid on every foreign ship which enters the port. The tolls are supposed formerly to have been collected by water-bailiffs appointed by the Bishop or his lessees; but are now received by the collector of lighthouse dues in the port of Sunderland, at his office in the custom-house there. The tolls appear to have been rated to the relief of the poor in the parish of Sunderland since the year 1719; but they were not rated in any of the townships into which the port of Sunderland extends till 1852.

*247] In that year the ancestor of the appellant, who was then lessee of the tolls, appealed against the rate for the parish of Sunderland, but abandoned that appeal, and agreed with the overseers of Sunderland to be rated on 150*l*. Immediately afterwards the five townships named in the case rated these tolls, making an aggregate of 403*l*. 3*s*. 4*d*., which, if they are rateable, is admitted to be the fair amount. Taking all these facts into consideration, we are of opinion that the tolls are not tolls in gross, but are tolls connected with the occupation and use of the soil. They seem to us to be very much in the nature of dock dues. The Bishop was the owner of the soil of parts of the port, and, by the outlay of money on various works, he rendered the port safe and commodious for shipping: in consideration whereof, by an exercise of the just prerogative of the Crown, he appears to have been authorized to receive a fixed sum, of reasonable amount, for every ship which entered his port. Consuetudines, or tolls, are almost incident to every ownership of a port, and we think they are to be considered as payable *ratione soli*, and for benefit conferred: not as an arbitrary extortion under the colour of law. The toll here is called "anchorage and beaconage;" but it must be considered as covering all the accommodation afforded by the owner of the port to the ships which frequent it, as no other payment is made to him. There was a strong objection offered to "beaconage." But the owner of this port does appear to have erected beacons within the port; and the anchorage and mooring-chains are a direct use of the soil within the parish and townships imposing the rate. If the use of the soil is any part of the consideration for the payment of the tolls, we think that this is enough to connect them with the

*248] occupation and use of the soil, and to render them rateable. We lately held, in the Runcorn Case, that tolls called "anchorage," which probably were for the use of the soil, were not rateable; but that was because it was found that the corporation of Liverpool, the appellants, were not the owners or occupiers of any land within the township, the place where the ships anchored being extra-parochial. Here the soil where the ships anchor and the mooring-chains were fixed is within the parish or township of the respondents. If there be a payment to the owner of the soil by the party who uses his soil, and no other consideration can be suggested for the payment, must not the use of the soil be regarded as the consideration for the payment? The tolls originally connected with the soil may be severed from the soil and become tolls in gross. Here, however, there is nothing to show such a severance; for the tolls and the soil have remained united in the same owner. The counsel for the appellant chiefly relied upon the Swansea Case, *Lewis v. Overseers*

of Swansea, 5 E. & B. 508 (E. C. L. R. vol. 85). There all the tolls rated, wheresoever collected within the port, were considered to be of the same uniform nature; and part of them being clearly not for the use of the soil and not rateable, this was supposed to give the same character to the whole. *Rex v. Coke*, 5 B. & C. 797 (E. C. L. R. vol. 11), and the other lighthouse cases, were likewise referred to; but these merely decide that the owner of the lighthouse cannot be rated for passing tolls collected out of the parish, as they do not constitute part of the annual profits of the house or land where the light is placed. The tolls in question, on the contrary, constitute part of the annual profits of land occupied by the appellant *within [*249 the township, and therefore they are rateable. Objection was made that the foreshore, between high and low water mark, did not belong to the Bishop, and that payments were sometimes made to the private owners of the foreshore by ships for the use of it. How can these conventional payments, made to others for the use of their soil, at all affect the nature or the incidents of the payments made to the Bishop for the use of his soil? We are likewise asked, by the first question, "Whether the tolls are rateable in all, or which, of the said townships or parish?" We answer, in all in which any part of the port of Sunderland is situate, and to which ships paying the toll come. These seem to be the parish of Sunderland and the five townships in which the tolls are now rated. There are other parishes and townships into which the port extends; but, as it is not stated that ships which have paid the toll come into these parishes and townships, we do not think that, in respect of the tolls, there is any profitable occupation of the soil of the port within these parishes and townships. In answer to the second question, we are of opinion that, in the parish and five townships in which the tolls are rateable, they ought to be rated upon a calculation of the number of ships paying the toll, and coming into those parts of the port which are in the parish of Sunderland and the five townships respectively; and that they ought not to be rated according to the frontage or population, neither of which could afford any criterion for the profits of the soil of the port made within the parish or the townships.

Judgment for the respondents.

***JOHNSON v. UPHAM and Another. July 2. [*250**

Stat. 2 W. & M. sess. 1, c. 5, s. 2, enacts "that where any goods or chattels shall be distrained for any rent," "and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof" "replevy the same," the person distraining may, after such distress and notice, and expiration of the five days, sell the goods. Stat. 11 G. 2, c. 19, s. 10, empowers the person making a distress "to impound, or otherwise secure the distress" "in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress."

Held that, upon the equity of stat. 2 W. & M. sess. 1, c. 5, s. 2, a tender by the tenant of the rent due, and costs, to the person distraining, within five days after the distress is taken and before sale, though after the distress has been impounded in accordance with stat. 11 G. 2, c. 19, s. 10, is a good tender.

Ellis v. Taylor, 8 M. & W. 415,† overruled.

Semble, that a distress is sufficiently impounded, in accordance with stat. 11 G. 2, c. 19, s. 10, where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession on the premises, but does not disturb, lock up, or remove any of the goods.

THE first count of the declaration alleged that plaintiff was tenant to defendants of the upper part of a house, No. 46, New Bond Street, at a yearly rent, payable quarterly; that defendants, pretending that certain arrears of the said rent were due to them, wrongfully seized and sold, as a distress for such arrears of rent, household furniture and other goods of plaintiff. Averments: first, that the goods seized and sold were more than sufficient to satisfy the said pretended arrears; secondly, that the distress was for more rent than was due; thirdly, that defendants did not, before the sale of the goods, leave on the premises any notice of the distress or of the cause of taking the same; fourthly, that defendants wrongfully and without plaintiff's consent sold the goods without having them duly appraised; fifthly, that defendants did not sell the goods for the best available price; *251] sixthly, that although, before the goods so *seized were sold, and before the same were impounded, plaintiff tendered to defendants a sum sufficient to satisfy the rent actually due, and costs, and requested them to redeliver the said goods to him, yet defendants refused to accept the sum so tendered, and wrongfully kept and withheld the goods from plaintiff, and sold the same; seventhly, that although, before the goods so seized were sold, and before the expiration of five days from the time of seizure, plaintiff tendered to defendants a sum sufficient to satisfy the rent actually due, and costs, and requested them to redeliver the said goods to him, yet defendants refused to accept the sums so tendered, and wrongfully and maliciously kept and withheld the goods from plaintiff, and sold the same.

Second count: That, plaintiff being tenant to defendants as in the first count mentioned, defendants seized and carried away, as a distress for pretended arrears of rent, household furniture and other goods of plaintiff, in excess of other goods of plaintiff which were sufficient to satisfy the rent actually due, and defendants thereby injured and damaged the goods seized, and deprived plaintiff of the use of them for a long time; whereby plaintiff was prevented from letting lodgings as he otherwise would have done; and was otherwise inconvenienced and injured.

Third count: Trover for household furniture and other goods of plaintiff.

Fourth count: Detinue for the same goods.

Pleas. 1. To the first three counts; Not guilty (by statute; 11 G. 2, c. 19, s. 21). 2. To the breach of duty sixthly averred in the first count; a traverse of the tender by plaintiff before the goods were impounded. 3. To the same; a traverse of the request by plaintiff *252] to *defendants to redeliver the goods. 4. To the breach of duty seventhly averred in the first count; a traverse of the tender by plaintiff before the expiration of five days from the seizure of the goods or at any time. 5. To the same; a traverse of the request by plaintiff to defendants to redeliver the goods. 6. To the fourth count; a traverse of the detainer. 7. To the same; a justifi-

cation of the detainer as a distress and impounding of the goods for rent in arrear.

Issues on all the pleas; and, to the 7th plea, new assignment of excess. Plea to the new assignment; Not guilty. Issue thereon.

There was also a demurrer by defendants to the breach of duty seventhly averred in the first count. Joinder in demurrer.

And a demurrer by plaintiff to the 2d, 3d, and 5th pleas. Joinder in demurrer.

At the trial, before Wightman, J., at the Sittings for Middlesex in last Easter Term, it appeared that the plaintiff was tenant to the defendants, from year to year, of the upper part of the house, No. 46, New Bond Street, which he let out as lodgings, the defendants themselves occupying the ground floor as a bookseller's shop. At Midsummer, 1858, the plaintiff gave the defendants notice to quit on the following Christmas. On 21st October, 1858, three quarters' rent being then in arrear, one Taylor went to the house with a warrant of distress, signed by the defendants. The plaintiff's wife (who resided on the demised premises, and had the sole management of them, the plaintiff himself being an invalid and living elsewhere) was from home; and, the first floor being locked, Taylor went with a man into the second floor and made an inventory of the furniture there; *which, together with a notice of distress, he gave to a servant. [*253 The man was left in possession, and remained in the kitchen by day, sleeping on the third floor at night. The warrant of distress was for 108*l.*, alleged arrears of rent, being 10*l.* more than was actually in arrear. The notice of distress was addressed to the plaintiff's wife, and was as follows. "Take notice that" "I have this day seized and distrained the goods, chattels, and effects found on the premises, the upper part, situate No. 46, New Bond Street," "for rent due and in arrears to" defendants "on 29th September last, being 108*l.*, and have taken an inventory thereof, a true copy of which is hereunder written; and if you do not pay the rent so due, together with the charges attending this distress, or replevy the said goods, chattels, and effects in the inventory mentioned, I shall, at the expiration of five days from the date hereof, make sale of the same, according to the direction of the Act of Parliament, of which take notice. Dated 21st October, 1858." The inventory specified the furniture and goods in the second floor, and added "and any other property on the premises sufficient to pay rent and expenses." On 26th October, 1858, at about 10 o'clock p. m., a tender was made, on behalf of the plaintiff, of 98*l.*, the rent which was really in arrear, and also of the costs of the levy, to the man in possession. Defendants were not then on the premises. The man in possession sent over to Taylor, the broker, who lived near, and a clerk of Taylor came to the house in the course of about half an hour, when the tender was made to and refused by him. On the following day, 27th October, Taylor came to make the appraisement preparatory to a sale, and demanded access to the first floor rooms, saying that if *they were not opened he should [*254 break open the door; upon which Mrs. Johnson, the plaintiff's wife, unlocked the door. The same thing took place as to a room on the third floor. On the same day goods which proved more than sufficient to cover the rent really due, and expenses, were appraised,

and removed from the premises to sale-rooms in the neighbourhood, where some of them were sold on 8th November. Those of them which were not sold were forthwith redelivered to the plaintiff's wife, at the house in Bond Street, at the defendant's expense. A verdict was taken for the plaintiff, with 5*l.* damages, it being agreed that leave should be reserved to the plaintiff to move to increase the damages by 60*l.*, if the Court should be of opinion, on the argument of the demurrers, that the sale was illegal; leave being also reserved to him to move on the point that the facts did not show an impounding in law.

Hayes, Serjt., in last Easter Term, obtained a rule calling on the defendants to show cause why the damages should not be increased to 65*l.*, and why the verdict should not be entered for the plaintiff on the issue joined on the allegation that the defendants sold after a tender made before impounding: on the ground that, on the evidence, no impounding had taken place before the tender. And it was further ordered that the demurrers should come on for argument with the rule.

Keane, for the defendants.(a)—The evidence shows that there was an impounding before the tender. Stat. 11 G. 2, c. 19, s. 10, empowers the person making a distress "to impound, or otherwise secure *255] the *distress" "in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress." That which was done by Taylor on 21st October, 1858, was a sufficient compliance with this enactment: *Thomas v. Harries*, 1 M. & G. 695 (E. C. L. R. vol. 39), *Tennant v. Field*, 8 E. & B. 336 (E. C. L. R. vol. 92). [Lord CAMPBELL, C. J.—It is now well settled that it is not necessary, in order to constitute an impounding, that the whole of the goods distrained should be put together or removed from the premises; but here the goods were left entirely undisturbed.] There may be an impounding without any disturbance or removal of the goods: *Firth v. Purvis*, 5 T. R. 432, *Washborn v. Black*, 11 East 405, n. In the latter case, it is true, as also in *Tennant v. Field*, the tenant consented to the manner of impounding adopted, namely, the leaving a person in possession of the goods, which continued undisturbed, on the premises. Slight evidence, however, is sufficient to prove the tenant's consent (if his consent be necessary) to that which is so much for his benefit; and in the present case the acquiescence of the plaintiff's wife in Taylor's acts, throughout, is sufficient evidence of the plaintiff's consent to them. An impounding, or otherwise securing, by putting a man into possession of goods distrained, but left on the premises, must have been in the contemplation of the Legislature when a charge per diem for "man in possession" was included in the schedule to stat. 57 G. 3, c. 93, the Act which regulates the charges to be made when a distress is for less than 20*l.*, and which must have been framed with reference to the practice under stat. 11 G. 2, c. 19, s. 10. *Such a method of impounding was recognised as *256] sufficient in *Child v. Chamberlain*, 5 B. & Ad. 1049 (E. C. L. R. vol. 27); and *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15), shows that mere notice to the tenant of the dis-

(a) Monday, June 6th. Before Lord Campbell, C. J., Wightman, Erle, and Crompton, Ja.

tress, and of the distrainer's intention to sell the goods unless they are replevied or the rent is paid, is enough to satisfy the requirements of the last-mentioned statute; although the distrainer afterwards quits the premises and does not leave any person in possession. The tender by the plaintiff was therefore too late, being made after the impounding.

Hayes, Serjt., and C. W. Wood, contra.—First, the goods distrained were not impounded before the tender was made. Stat. 11 G. 2, c. 19, s. 10, implies a distinction between to "impound" and to "otherwise secure." It may be admitted that the evidence shows that the goods were "otherwise secured" in a manner to satisfy the statute. They were not, however, impounded. In order to impound them, it would have been necessary for Taylor to have collected them together into one room, to have locked the door, and to have taken away the key. The distinction is important; for the technical consequence, at common law, of an impounding, namely, the ousting of a subsequent tender, does not extend to an "otherwise securing" under the statute. If the securing of the goods on the premises is equivalent to an impounding and ousts the tender, there is no moment of time at which a tenant can legally tender, after a distress is put in, where, as in the present case, the distress and the impounding are concurrent acts. But, secondly, even assuming that the goods were impounded [*257] before the tender, it is contended that the tender within the next five days, and before the sale, was good, notwithstanding; if not at common law, at all events upon the equity of stat. 2 W. & M. sess. 1, c. 5, s. 2. *Pilkington's Case*, 5 Rep. 76 a, is the authority generally cited for the proposition that a tender after impounding is too late. That, however, was a case of distress damage feasant. Lord Coke's report of it, moreover, refers to a case "adjudged Trin. 33 Eliz. between Nevil and Segrave" to the same effect. But in the report of *Pilkington's Case*, in Croke (*Pilkington v. Hastings*, Cro. Eliz. 813), it is said that "a precedent was cited in this Court, that the tender of amends, after the impounding, was good; which was Trin. 33 Eliz. rot. 327, between Bardsey and Segrave." Probably the case which was actually cited was *Nevill v. Seagrave*, Cro. Eliz. 332, Trin. 33 Eliz. rot. 323; an action of replevin in which the defendant avowed for damage feasant; and the plaintiff replied that, the day after the distress taken, he tendered sufficient amends, scil. sixpence, which the defendant refused; upon which the plaintiff demurred, because the tender was not before the impounding. Gawdy argued that "the tender is good, although the cattle be impounded; and if the party that distrained refuseth it, the owner may take them out of pound;" and the Court appears to have been of that opinion, as they "gave day to the defendant to show cause to the contrary, otherwise judgment shall be given for the plaintiff;" although "Tanfield at the bar said it was adjudged in Sir Henry Cromwel's case in the Common Bench, that tender after impounding, cometh too late." *Pilkington's Case* *was, however, mainly decided on another [*258] point; for, whatever was the precedent really cited, Croke says that "the Court had not much regard thereto, because they were resolved upon the last point, that the tender to the servant was not good;" *Pilkington v. Hastings*, Cro. Eliz. 813. Granting,

however, that Pilkington's Case, 5 Rep. 76 a, is an authority that a tender after impounding is too late, in a case of distress damage feasant, this Court has said that that doctrine is not to be extended to cases of distress for rent: Hatch v. Hale, 15 Q. B. 10 (E. C. L. R. vol. 69). Lord Coke, certainly, in The Six Carpenters' Case, 8 Rep. 146 a, 147 a, states as a general rule that tender after impounding is too late, in all cases of distress. He there says: "Note, reader, this difference that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of detinue for the detainer after; or he may, upon satisfaction made in Court, have a writ for the redelivery of his goods." It may be doubted whether this passage correctly states the law as it then stood. A landlord was then entitled to hold a distress as a mere pledge, till the rent was paid; he could not sell it. Upon paying the rent, the tenant received back his goods. But, according to Lord Coke, the tenant, if he neglected to *259] tender the rent *before the impounding, was compelled to incur the costs of an action of replevin in which he must necessarily fail, before he could have any remedy against his landlord for the continued detention of the goods. Supposing, however, that such was the state of the law before the passing of stat. 2 W. & M. sess. 1, c. 5, it was altered by that statute. The title of this Act throws light upon the object which the Legislature had in view. It is entitled "An Act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time." And this object is further illustrated by sect. 1, which recites that "the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby." As a remedy for this state of things, it is enacted, by sect. 2, "that where any goods or chattels shall be distrained for any rent," "and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof," "replevy the same," then, at the expiration of the five days, the person distraining may cause the goods to be appraised and sold. Although this enactment, in terms, restricts the tenant's remedy, after a distress has been put in, to an action of replevin; still, if an equitable construction, in accordance with the intention, is given to the Act, it is evident that it was meant to protect the tenant also, if he tenders the rent within the five days, though after the distress is impounded. [WIGHTMAN, J.—Ellis v. Taylor, 8 M. & W. 415,† is *260] an authority against you.] It must be admitted that it is. *In that case, however, the judgment was rested on the ground that Thomas v. Harries, 1 M. & G. 695 (E. C. L. R. vol. 89), and Ladd v. Thomas, 12 A. & E. 117 (E. C. L. R. vol. 40), had already decided the point. Ladd v. Thomas, however, decided nothing more than that a distrainer may justify retaining possession of the distress, not

withstanding a tender of the rent made after the impounding; nor that he may sell the distress after such tender. *Thomas v. Harries*, did, it is true, decide the point; but is a case of very little weight, as Bosanquet and Erskine, Js., concurred in the judgment with hesitation, and Maule, J., dissented from it. In *Ellis v. Taylor*, 8 M. & W. 415,† the Court overlooked the distinction which exists between a distress for rent and a distress damage feasant; and did not give due regard to the form of the action, which was not replevin, but one for selling the distress. That case ought now to be overruled. [WIGHTMAN, J.—I see that in *Ellis v. Taylor*, Parke, B., who seems not to have been in Court when the rule was made absolute, said, when the rule was moved for (8 M. & W. 416:†) “At common law, undoubtedly a tender made after impounding is too late; but the question is, whether, upon the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2, an action is not maintainable for selling goods seized under a distress, when a tender of the rent and expenses is made before the sale, although after the impounding. It is laid down in Mr. Chitty’s *Precedents in Pleading*, vol. ii., p. 723 (5th ed.) that in a distress for rent, upon the equity of this statute, a sale of the distress after tender of the rent and costs would be illegal, and that in such case trespass is the proper remedy: and certainly the precedents are constantly in this form. The object of the distress is *only to realize the rent.”] It is contended, for the plaintiff, that that is a correct [*261 statement of the law. Had Parke, B., taken part in the judgment in *Ellis v. Taylor*, 8 M. & W. 415,† the decision might have been different. Lastly, the third and fifth pleas are bad: for no request by the plaintiff to the defendants to redeliver the goods was necessary.

Keane, in reply.—*Ellis v. Taylor*, 8 M. & W. 415,† is directly in favour of the defendants; and there is no authority to support the statement in Chitty there referred to by Parke, B. *Branscomb v. Bridges*, 3 Stark. 171 (E. C. L. R. vol. 3), cited by Chitty, was a mere pleading decision as to the proper form of action by a tenant. Stat. 2 W. & M. sess. 1, c. 5, s. 2, is not to be extended beyond its plain meaning; and replevin is the only remedy which it gives to a tenant, after a distress has been impounded. But even if the Court should be of opinion that *Ellis v. Taylor* was wrongly decided, it will not overrule the judgment of a Court of co-ordinate jurisdiction, which can be questioned only in a Court of error. *Cur. adv. vult.*

WIGHTMAN, J., now delivered the judgment of the Court.

This was an action for selling goods taken under a distress for rent, after tender of the rent before the impounding, and also after the impounding and before the sale. The declaration having stated both the tenders, there was a demurrer to so much of the declaration as stated a tender after the impounding and before the sale.

*Upon the argument, as well upon the points reserved at the trial as upon the demurrer, two questions were made. [*262 First, whether there had been an impounding before the tender; and, secondly, if there had, whether a tender of the rent, after the impounding, but within the five days and before the sale, was good. The Court was disposed to think that there was evidence of an impounding before the sale; but this point became comparatively unimportant, as the Court was unanimously of opinion that a tender

of the rent, made after the impounding and before the sale, is good. There is no doubt but that, at common law, a tender after the impounding availed nothing, either in the case of a distress for rent, or for damage feasant. The question, however, arises upon the equity of the statute 2 W. & M. sess. 1, c. 5. s. 2, in cases where a distress has been made for rent. That statute is entitled "An Act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time." It recites that "the most ordinary and ready way for recovery of arrears of rent is by distress, yet such distresses not being to be sold, but only detained as pledges for enforcing the payment of such rent, the persons distraining have little benefit thereby;" and then it enacts that, where the tenant or owner of the goods shall not within five days replevy the same, the person distraining shall and may, after the expiration of the five days, sell the same. The case most relied upon by the defendants was that of *Ellis v. Taylor*, 8 M. & W. 415,† in which the Court held, upon the authority of two previous cases, that a tender after impounding a distress for rent was too late. The two cases were *Thomas v. Harries*, 1 M. & G. 695 *263] (E. C. L. R. vol. 39), in *which Maule, J., differed from the other Judges, and *Ladd v. Thomas*, 12 A. & E. 117 (E. C. L. R. vol. 40). Undoubtedly, those cases are authorities upon the point: but, notwithstanding those decisions, the Judges of this Court who heard the argument were unanimously of opinion that, upon the equity of the statute of William and Mary before referred to, an action is maintainable for selling goods distrained for rent, after tender of the rent and the expenses, though the tender be made after the impounding: and the judgment was only delayed for the more deliberate consideration of the question, in deference to those authorities. The object of the statute of William and Mary seems hardly to have been sufficiently adverted to in the cases to which reference has been made. At common law a tender of the rent, after the impounding, would not make either the distress or the impounding illegal; but the question is, whether, since the passing of the statute of William and Mary, a sale after tender of the rent and expenses is not illegal, upon an equitable construction of the Act. At common law, the goods distrained could not have been sold, and the statute was passed to enable the landlord to sell them "in case the rent be not paid within a reasonable time." The title of an Act of Parliament is no part of the law, but it may tend to show the object of the Legislature. The common form of notice of distress for rent concludes by informing the tenant "that unless he pays the said rent, with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law." It is true that, by the precise words of the statute, the goods may be *264] sold unless the tenant or *owner shall within five days replevy the same; and no option is given to the tenant of paying the rent and expenses. If, notwithstanding the alteration of distress introduced by the statute, the old rule as to tender remains in all its strictness, the tenant could not, during the five days, prevent a sale of his goods by tender of all the rent distrained for or claimed, with all costs and expenses; but must either, although perfectly ready and willing to pay all that is or can be required of him, submit to a sale

of his goods at a great loss and inconvenience, or go through the process of a suit in replevin for which he has no shadow of ground, and in which he must necessarily be defeated. The only object of the authority given by law to distrain and sell the goods being to procure payment of the rent, the hardship and injustice of allowing the landlord to refuse payment of rent and expenses before sale, and nevertheless proceed to sell the goods after tender of payment, was obviously so great, that it was long ago thought that such a proceeding by the landlord was an abuse of the authority given to him by the law, and that an action on the case was maintainable upon what was called the equity of the statute of William and Mary, against a landlord who persisted in selling the goods after tender of the rent and costs: and, in the case of *Ellis v. Taylor*, 8 M. & W. 415,† already referred to, Parke, B. (who does not appear to have taken part in the judgment), seems, from an observation made by him when the rule was moved for, to have been disposed to think that such an action was maintainable, and refers to the precedents, and particularly to Mr. Chitty's *Precedents in Pleading*. The landlord's alleged right to reject payment and *proceed to sale after tender is founded [*265 upon an old and technical rule, which might be applicable to the law of distress as it was before the passing of statutes 2 W. & M. sess. 1, c. 5, and 11 G. 2, c. 19, by the latter of which the goods distrained may be impounded or secured upon the premises; but can hardly have any reasonable application to cases arising since those statutes. Indeed, in most cases since the passing of the latter statute, it would hardly be possible for a tenant to make a tender after a distress and before impounding, as these acts are usually very nearly if not quite concurrent. Our opinion being that, upon an equitable construction of the statute of William and Mary, and in consequence of the change in the law relating to distresses for rent by that statute and stat. 11 G. 2, c. 19, a landlord ought not to sell the goods after a tender of the rent and costs made at any time within the five days; judgment upon demurrer will be entered for the plaintiff, and the rule will be made absolute for increasing the damages by 60%.

Judgment on demurrer, for the plaintiff; and rule absolute to increase the damages to 65%.

*The QUEEN, on the prosecution of the Churchwardens and Overseers of the Township of STOCKTON, v. the Inhabitants of the Township of ELVET.(a) June 8. [*266

In 1835, the pauper's father and mother went to reside at E., and they both continued to reside there till July, 1847. The pauper was born there in January, 1844. In July, 1847, the mother became chargeable to E., as a lunatic, and was removed to an asylum at B. In September, 1849, an order was made by justices, adjudging the mother's settlement to be in S. After remaining in the asylum, at the charge of S., for several years, she was removed to the workhouse in S., and was maintained there by S., as a lunatic, till her death in October, 1858. The pauper continued to reside with her father, in E., from her birth till his death, in Decem-

(a) This case, which should have been reported amongst those of Trinity Term, has been accidentally misplaced.

her, 1857; and, after his death, she remained there till February, 1858, when she became chargeable to E. In December, 1858, an order was made for her removal to S., which was quashed, on appeal, by an order of Sessions. Held, confirming the order of Sessions, that the pauper was, by stat. 9 & 10 Vict. c. 66, irremovable from E.; for that the relief afforded to her father by the maintenance of her mother did not deprive him of the status of irremovability from E. which he had previously acquired; that that status was communicated to the pauper, and that she retained it at the date of the order of removal.

ON an appeal by the township of Stockton, in the county of Durham, against an order of two justices of that county, dated 18th December, 1858, for the removal of Margaret Storey, single woman, from the township of Elvet, in the same county, to Stockton, the Sessions quashed the order, subject to the opinion of the Court of Queen's Bench on the following case.

The settlement of William Storey, the father of the pauper, Margaret Storey, was in the appellant township. He married in the year 1835, and shortly after, in the same year, went to reside in the respondent township. The pauper was born in the respondent township on 30th January, 1844. Ann Storey, the mother of the pauper, became chargeable to the respondent township as a lunatic on 9th *267] July, 1847, and was removed to the lunatic asylum at Ben-sham, in the county of Durham. An order was duly obtained from two magistrates of the county of Durham, on 19th September, 1849, adjudging the settlement of the said Ann Storey to be in the appellant township, and ordering that township to pay for her maintenance from 19th September, 1848, being twelve months previous to obtaining the order. Ann Storey was, several years afterwards, removed from the said lunatic asylum to the union workhouse in the appellant township, and was maintained as a lunatic by the appellant township to the time of her death, which occurred there on 10th October, 1858. The pauper, Margaret Storey, continued to reside with her father in the respondent township from her birth till the time of his death. He died on 8th December, 1857, having resided in the respondent township since the year 1835. The pauper continued to reside in the respondent township after her father's death, and became chargeable to the respondent township on 6th February, 1858, and on 18th December, 1858, an order for the removal of the said pauper to the appellant township was obtained.

It was contended by the appellant township that the pauper was irremovable, under stat. 9 & 10 Vict. c. 66, s. 1. The Court of Quarter Sessions, being of that opinion, quashed the order.

The question for the opinion of the Court was, Whether the pauper Margaret Storey was irremovable from the respondent township.

If the Court should be of opinion that she was, then the order of Sessions was to be confirmed, and the order of removal quashed. If the Court should be of opinion that she was not, then the order of Sessions was to be quashed, and the order of removal confirmed.

*268] *Davison*, in support of the order of Sessions.—Stat. 9 & 10 Vict. c. 66, s. 1, after enacting that a person who has resided for five years in a parish shall be irremovable from that parish, provides "that the time" "during which any such person shall receive relief from any parish" "shall for all purposes be excluded in the computation of" the five years. The question therefore is, whether the time during which relief was afforded to the pauper's father, by

the maintenance of her lunatic mother, is to be deducted from the time during which the pauper resided in the respondent township. It is obvious that no such deduction ought to be made. The relief in question cannot be said to have been received by the pauper. *Regina v. Shavington cum Gresty*, 17 Q. B. 48 (E. C. L. R. vol. 79), which may be relied upon by the other side, was a very different case. It was there held that relief given to or on account of the children, under sixteen, of a widow, was to be considered as given both to the widow and to the children; so that the time during which such relief was received was to be excluded from a computation of the five years of residence necessary to make the children irremovable. But there it was expressly found that the relief was received by the mother for the support of herself and the children. The circumstances of the present case show, on the contrary, that the relief afforded to the pauper's father was not on account of his children.

Liddell, contra.—The pauper, having been born in January, 1844, in the respondent township, had resided there only three years and a half, when, in July, 1847, *relief was afforded to her mother, [*269 which, by reason of stat. 4 & 5 W. 4, c. 76, s. 56,(a) was relief given to her father. Owing to this receipt of relief, a disability to acquire the status of irremovability attached to the father, and consequently to the pauper also, as his unemancipated child, living with him: *Regina v. St. Anne, Blackfriars*, 2 E. & B. 440 (E. C. L. R. vol. 75). In *Regina v. Shavington cum Gresty*, Lord Campbell, C. J., says, "The intention of stat. 9 & 10 Vict. c. 66, s. 1, was to make any pauper irremovable after an unbroken residence of five years in any parish, unless (among other exceptions) during any part of such time he should have received parochial relief from any parish." [Lord CAMPBELL, C. J.—The pauper's father had acquired the status of irremovability before the relief was afforded. How can it be said that he lost this status by a subsequent receipt of relief?] At all events, if the pauper was irremovable during her father's lifetime, she ceased to be so at his death. Her mother then became the head of the family, and the children's status became that of the mother, who was then not only removable, but actually removed. By stat. 11 & 12 Vict. c. 111, s. 1, "whenever any person" has "a wife or children having no other settlement than his or her own, such wife and children" are "removable from any parish or place from which he or she would be removable."

Davison, in reply.—The point last suggested, on the other side, that the pauper's status, after her father's death, became that of her mother, might have been *entitled to consideration, if the order of [*270 removal had been made during the mother's lifetime; but the mother was dead when it was made. The pauper, therefore, then continued irremovable.

Lord CAMPBELL, C. J.—I am of opinion that the pauper, by her residence with her father, acquired the status of irremovability. This status, which the father had acquired before he received relief through his wife, was not taken from him by such subsequent receipt of relief.

(a) Which enacts that "all relief given to or on account of the wife" "shall be considered as given to the husband of such wife."

And at the time that the order for her removal was made, the pauper continued irremovable, her mother being then dead.

WIGHTMAN, J.—By her residence with her father the pauper became irremovable, and, as she continued to reside in the respondent township down to the time that the order for her removal was made, and her mother had died before that time, she was then still irremovable.

ERLE, J.—The fact that the father of the pauper received relief after he had acquired the status of irremovability does not appear to me to affect the question. When her father died, the pauper had acquired an independent status of irremovability, which she retained down to the time that the order of removal was made.

CROMPTON, J., had left the Court.

Order of Sessions confirmed.

END OF TRINITY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Michaelmas Term,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1859.

The Judges who usually sat in banc in this Term were,—

COCKBURN, C. J.
WIGHTMAN, J.

HILL, J.
BLACKBURN, J.

ARCHER *v.* JAMES and Another. Nov. 4.

[Reported 2 B. & S. 61.]



NEWCOMB and Another *v.* DE ROOS. Nov. 5.

Defendant, residing and carrying on business in London, wrote to plaintiffs, residing and carrying on business in S., ordering them to do certain work for him. The letter was received by plaintiffs, and the work was done, in S. A summons having issued, upon plaintiffs' application, against defendant, in the County Court of S., by leave of the Registrar, to recover the amount due for such work: Held, that the whole cause of action arose within the district of that Court, and that the Registrar therefore had jurisdiction to issue the summons, under stat. 9 & 10 Vict. c. 95, s. 60, and stat. 19 & 20 Vict. c. 108, s. 15.

B. C. ROBINSON moved for a prohibition to the Judge of the County Court of Stamford, to restrain *further proceedings in a plaint [*272 issued from that Court by the plaintiffs against the defendant.

It appeared from the affidavit that the plaintiffs, who were stationers residing and carrying on business at Stamford, had sued the defendant, who was a vendor of patent medicines in Berners Street London, to recover 3*l.* 4*s.* 10*d.* balance of account for advertisements

inserted by the plaintiffs in certain newspapers, on the defendant's order. The arrangement between the plaintiffs and the defendant had been that certain advertisements were to be inserted by the plaintiffs for the defendant, for which the plaintiffs were to receive payment in goods, and which goods were delivered by the defendant in London to the plaintiffs' order. All orders given by the defendant, or on his behalf, to the plaintiffs for the insertion of advertisements, and all communications relating to the transactions between the plaintiffs and the defendant, were written in London, and transmitted through the post thence to Stamford. The defendant did not reside or carry on business within the jurisdiction of the Stamford County Court. In the particulars of demand the defendant was debited with 21l. 3s. 7d., for various advertisements, and with 1l. 10s. for "cash," and 2l. 1s. 11d., for "returns;" and was credited with the amount of the goods received by the plaintiffs "on sale or return."

B. C. Robinson, for the defendant.—Stat. 9 & 10 Vict. c. 95, s. 60, enacts that the summons in a County Court plaint "may issue in any district in which the defendant" "shall dwell or carry on his business at the time of the action brought; or, by leave of the Court for the district in which the defendant" "shall have dwelt or carried on *273] his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned Courts." And, by stat. 19 & 20 Vict. c. 108, s. 15, "The registrar of any County Court may issue a summons against any defendant residing out of the jurisdiction of such Court, at any time, upon the application of any plaintiff who will depose before such registrar that his cause of action has arisen within the jurisdiction of such Court, in like manner as any Judge of any County Court has now power to issue any such summons." The summons, in the present case, was issued on the assumption that the cause of action arose within the district of the Stamford County Court. But "the cause of action" means the whole cause of action: *Re Fuller*, 2 E. & B. 573 (E. C. L. R. vol. 75), *Borthwick v. Walton*, 15 Com. B. 501 (E. C. L. R. vol. 80), *Jackson v. Beaumont*, 11 Exch. 300.† Here, the whole cause of action did not arise within the district of the Court from which the summons issued. The order, which was part of the contract, was given out of the district, though the work was done within it; as in *Borthwick v. Walton*. [WIGHTMAN, J.—The order was received at Stamford; and it was no contract, or part of a contract, until received and accepted.] The *causa causans* was the writing the letter giving the order. The defendant had no further control over the letter after he had posted it. [COCKBURN, C. J.—That is only in consequence of the regulations of the Post Office. The defendant could write again, before the receipt and acceptance of the order, and revoke it.] In *Rex v. Burdett*, 4 B. & Ald. 95 (E. C. L. R. vol. 6), it was held *274] by the majority of the Court that a delivery at a post office, in one county, of a letter, containing a libel, directed to and received by a person in another county, was a publication of the libel in the first county. To put an extreme case: Suppose that the plaintiffs and the defendant were standing on different sides of the boundary line of the Stamford district, and that the order was then

verbally given by the defendant, and accepted by the plaintiffs; surely part of the contract would arise without the district. Further, the plaintiffs' particulars do not show where the cause of action with respect to the two items of "cash" and "returns" arose. [COCKBURN, C. J.—If, on the trial, the plaintiffs did not prove that the cause of action with respect to those items arose within the district, those items would of course be disallowed. HILL, J.—You are asking us to review the decision of the registrar.] He has no discretion: he must issue the summons if, according to the language of the 41st rule of practice of the County Courts, "he is satisfied" that the cause of action arose within the district. [COCKBURN, C. J.—You are bound to show us that he was satisfied upon insufficient grounds.]

COCKBURN, C. J.—I am of opinion that there should be no rule. Admitting that, to enable the registrar to issue a summons to a defendant residing beyond the district, the *whole* cause of action must have arisen within that district, I think that, here, the whole cause of action did arise within the district of the Stamford County Court. The cause of action is work done by the plaintiffs at the request of the defendant. The request of the defendant was made in London, by letter; but it was not such a request as created a contract until it was received and accepted by the plaintiffs; and that took *place [*275 at Stamford; where, also, the work was done. The whole cause of action, therefore, both the work and the contract under which it was performed, arose at Stamford.

WIGHTMAN, J., concurred.

HILL, J.—I accept the test proposed by the defendant's counsel. Suppose the two parties stood on different sides of the boundary line of the district: and that the order was then verbally given and accepted. The contract would be made in the district in which the order was accepted. Here the order was accepted in the district of the Stamford County Court; and the work was done within that district. The whole cause of action, therefore, arose within that district.

(BLACKBURN, J., was absent).

Rule refused.

It is well settled in England that, where an offer has been made by letter, the mailing of the letter of acceptance consummates the contract (*Adams v. Lindsell*, 1 B. & Ald. 681), even though it never reaches its destination: *Duncan v. Topham*, 8 C. B. 232 (E. C. L. R. vol. 65), and the same rule has been generally adopted in this country: *Taylor v. Insurance Co.*, 9

How. 390; *Brisban v. Boyd*, 4 Paige 17; *Averill v. Hedge*, 12 Conn. 486; *Vassar v. Camp*, 1 Kernan 441; s. o., 14 Barb. 341; *Levy v. Cohen*, 4 Geo. 1; *Hamilton v. Insurance Co.*, 5 Barr 889; *Chiles v. Nelson*, 7 Dana 281; *Falls v. Gaither*, 9 Porter 605; *Bost. & M. Railroad v. Bartlett*, 3 Cush. 224; *The Palo Alto, Davels* 843.

The QUEEN v. The Inhabitants of SELBORNE. Nov. 9.

In May, 1845, a minor, whose father was then settled in S., left his father's house for London, with his father's consent, and entered the Metropolitan Police. He continued to live in London and to serve in the Police from that time till May, 1846; when, being still under age, he married. During the whole time between his coming to London and his marriage, he might have returned to his father's house to reside, but never did so. At Lady Day, 1846, his father gained a settlement in H. Held, that the son was not emancipated until his marriage; that, consequently, he derived from his father the settlement in H.; so that the son's wife and children were not removable to S.

UPON an appeal, at the Sessions for Middlesex, in October, 1858, against an order of two justices, for the removal of Marian Andrews, *276] wife of John Andrew Andrews *(therein stated to be then insane), and her four infant children, from the parish of Saint Matthew, Bethnal Green, in the county of Middlesex (the respondent parish), to the parish of Selborne, in the county of Southampton (the appellant parish), the Sessions confirmed the order, subject to the following case.

The paupers are the wife and lawful children of John Andrew Andrews, who is now insane and an inmate of a lunatic asylum, and who never did any act whereby to gain a settlement in his own right. The said J. A. Andrews is the lawful son of John Andrews and Ann his wife, and was born on 3d October, 1827. The said John Andrews gained a settlement in the said parish of Selborne by renting and paying rates for a farm in that parish, which he quitted at Michaelmas, 1844. At Lady Day, 1845, he became tenant of land and a house in the parish of Hampton, in the county of Middlesex, and, at Lady Day, 1846, he became settled in the said parish of Hampton, by renting and paying rates for the said land and house. The said J. A. Andrews always lived at home with his said father as part of his family, and was unemancipated up to the month of May, 1845, when (with his father's sanction) he engaged himself as a police constable in the Metropolitan Police Force, and resided in London as such constable, and he never afterwards returned to reside at his said father's house, but only went there as a visitor: though, during the whole time until his marriage, he might have returned if he had been so disposed. When the settlement in Hampton was completed, at Lady Day, 1846, the said J. A. Andrews was nearly nineteen years of age, had left his father's house, and was serving as a constable in the Metropolitan Police Force, and continued so to serve until 16th May, *277] *1846, when he was married, not having been married before that time. Hampton is twelve miles from London, and while the said J. A. Andrews continued in the Police Force it was necessary for the proper discharge of his duty as a constable that he should reside in London, and he did so reside there.

It was contended, on behalf of the appellants, that the said J. A. Andrews was not emancipated at the completion of his father's settlement at Hampton, nor until his marriage.

It was contended by the respondents that, by leaving his father's house and enlisting as a constable in the Police Force, and continuing to serve in that force from May, 1845, until his marriage in 1846, he was during the whole of that time free from his father's control, and

had ceased to be a member of his father's family, and must now be considered as emancipated at the completion of his father's settlement at Hampton.

The question for the opinion of the Court was, Whether the said J. A. Andrews was now to be considered as emancipated at the time of the completion of his father's settlement at Hampton.

If the Court should be of opinion that he must now be considered as emancipated before the completion of such settlement, the order of removal was to stand confirmed; but if the Court should be of a contrary opinion, the said order was to be quashed.

W. Smart, in support of the order of Sessions.—The pauper's husband, J. A. Andrews, was emancipated at the time of his father's gaining the settlement at Hampton, in 1846. It may be conceded that J. A. Andrews *was not emancipated by reason merely [*278 of his serving in the Metropolitan Police Force, and residing apart from his father. He became emancipated, however, by his marriage, whilst under age, in May, 1846. And the emancipation, thus acquired, is to be reckoned back to the date of his entrance into the Police. In *Rex v. Rotherfield Greys*, 1 B. & C. 345 (E. C. L. R. vol. 8), it was held that a minor, who, having enlisted into the Marines, was discharged from that service, and returned to his father's family before he attained the age of twenty-one years, was not emancipated. But Bayley J., in giving judgment, said, "In this case, the pauper, by enlisting into the Marines, became subject to the control of the crown, and continued subject to that control, as long as the period of his service continued; and if he had remained in the army till the age of twenty-one years, his emancipation would undoubtedly relate back to the time of his enlistment; but before he attained the age of twenty-one years, the relation between him and the crown ceased, and he returned to and constituted part of his father's family, and of course again became subject to the parental control." In the present case the pauper was, as a policeman, under the control of the State, uninterruptedly, till his marriage; and his marriage whilst under that control had the same effect as, according to Bayley, J., his attainment of the age of twenty-one, under the same circumstances, would have had. Service as a policeman is equally of a nature to exclude parental control, with service as a soldier. [WIGHTMAN, J.—To have the effect for which you contend, the service must be *such as [*279 permanently to exclude parental control. The service of a soldier is of that nature; for he cannot return home at his own option. But a policeman may quit the force whenever he chooses.] A policeman, no less than a soldier, becomes, as such, subject to an authority paramount to that of his parent. The present case is, therefore, distinguishable from *Rex v. Lytchet Matraverse*, 7 B. & C. 226 (E. C. L. R. vol. 14), where the pauper had subjected himself to an authority subordinate to the parental. *Regina v. Scammonden*, 8 Q. B. 349 (E. C. L. R. vol. 55), will be relied upon on the other side; but, there, the service of the pauper in the militia was only for twenty-eight days in the year; so that his duties were not, like those of a policeman, such as wholly and permanently to exclude parental control. [HILL, J.—What difference is there between the case of a policeman and that of an apprentice? Service as an apprentice has been held

not to exclude parental control: *Rex v. Huggate*, 2 B. & Ald. 582.] An apprentice serves a private master; a policeman serves the State. *Metcalfe*, contra, was not called upon.

WIGHTMAN, J.—We are of opinion that the service of the pauper's husband in the Police Force was not sufficient to cause his emancipation to relate back to the commencement of that service. The only cases to be found in the books, in which an entry into service by a minor has been held to exclude the parental control of his father, are cases where the service was as a soldier. The distinction between *280] those cases and the present is, *that a soldier cannot himself put an end to his service, inasmuch as the military authorities would not allow him; whereas a policeman can quit the force whenever he is so disposed.

HILL, J.—I am of the same opinion. The case expressly finds that, during the whole time that the pauper's husband was serving in the Police Force, he might have returned to his father's house, if he had been so disposed. Had he been a soldier, he would not have been at liberty to return. The cases cited, to which I may add that of *Rex v. Woburn*, 8 T. R. 479, are expressly in point to show that the emancipation of the pauper's husband has no such relation back as is contended for.

BLACKBURN, J.—I am of the same opinion. The distinction is obvious between the position of a soldier and that of an apprentice or other person who has an option, which a soldier has not, to terminate his service. Order of Sessions quashed.

*281] *CLARK, Appellant, v. HAGUE, Respondent. Nov. 9.

By stat. 12 & 13 Vict. c. 92, s. 3, "every person who shall keep or use or act in the management of any place for the purpose of fighting" "any" "cock," "or shall permit or suffer any place to be so used," is subjected to a penalty "for every day he shall so keep or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid;" "and every person who shall in any manner encourage, aid, or assist at the fighting" "of any" "cock," "as aforesaid," is made liable to a penalty not exceeding 5*l*.

Held, that a person does not incur this latter penalty by aiding and assisting at cock-fighting in any place; but only if the place be one so kept or used for the purpose, as to subject the keeper of it to the penalty imposed by the first clause of the section.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

At a Petty Sessions, holden at Loughborough, in the county of Leicester, on 7th April, 1859, before two justices of the peace for the said county, an information was preferred by the respondent against the appellant, under stat. 12 & 13 Vict. c. 92, s. 3, for that the appellant, on 2d March, 1859, at the parish of Loughborough aforesaid, did encourage, aid, and assist at the fighting of two cocks, then being fought in a certain place (to wit) a bowling alley there, in the occupation of the appellant, then kept and used for the purpose of fighting cocks, contrary to the provisions of the said statute, intituled "An Act for the more effectual prevention of cruelty to animals." The appellant was convicted, and fined 10*s.*, and was also ordered to pay the costs of the respondent, and, on default, to be imprisoned for fourteen days.

At the hearing of the information, it was proved, on the part of the respondent, that, on the day named in the information, at a bowling alley belonging to the appellant's licensed victualling-house at Loughborough, two cocks were fought by the appellant and one John Taylor. The justices were of opinion, upon the evidence produced before them, that the said appellant and *the said John Taylor [*282 did resort to the said bowling alley with the intention of causing the said cocks to fight together there, and that they did encourage, aid, and assist at the fighting of the said two cocks at the said place; but it was not proved that in any other instance had cocks been fought there.

It was contended on the part of the appellant, that there was no offence committed within the intent and meaning of stat. 12 & 18 Vict. c. 92, s. 3, inasmuch as the said section only applied to encouraging, aiding, or assisting at the fighting of cocks in any place regularly kept or used for that purpose, as mentioned in the first clause of the said section; namely, a place so kept or used for the purpose of fighting any cocks, as to subject the keepers thereof to the penalty fixed by the said section, and that it did not appear that the said bowling alley was a place so kept or used.

The justices, however, were of opinion that the words, "Every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds," contained in the concluding clause of the said 3d section, applied to the encouraging, aiding, or assisting at the fighting of cocks in any place; and that the words "as aforesaid" meant other animals as aforesaid (namely any animal of domestic or wild nature), and not, as was contended by the appellant, the place as aforesaid (namely a place kept or used for the purpose of fighting any bull, bear, badger, dog, cock, or other kind of animal, as mentioned in the first clause of the said section); and being also of opinion that the evidence given before them, brought the case within the concluding clause of the said [*283 *3d section, they convicted the said appellant of encouraging, aiding, and assisting at the fighting of two cocks, at Loughborough; considering, according to their construction of the Act as above stated, that the portion of the information which alleged that they were fought in a place kept or used for the purpose of fighting cocks, was not a material allegation, and consequently might be treated as irrelevant matter.

The question of law for the opinion of the Court was, whether it was an offence, within the intent and meaning of the 3d section of the said statute, to encourage, aid, or assist at the fighting of cocks in any place, or only in a place so kept or used for the purpose of fighting cocks, as to subject the keeper thereof to the penalty prescribed by the first clause of the said section.

Hayes, Serjt., for the appellant.(a)—The conviction is wrong. The offence created by the Act of Parliament can be committed only in a place kept or used for the purpose of committing it. There was no evidence before the justices that the appellant's bowling alley was such a place; or that cocks had ever been fought there, except in this

(a) Before Cockburn, C. J., Wightman, Hill, and Blackburn, J.

one instance. That the meaning of the Act is that for which the appellant contends is evident, when the previous enactments upon the subject are looked at. The first of these is stat. 3 & 4 W. 4, c. 19, s. 29, which imposed a penalty upon "any person who" should, "within five miles of Temple Bar, keep or use, or" "act in the management or conducting of any premises or place whatsoever for the purpose of" "cock-fighting." This was repealed by stat. 5 & 6 W. 4, c. 59, *s. 1, by sect. 3 of which statute a penalty is *284] imposed upon "any person" who "shall keep or use any house, room, pit, ground, or other place for the purpose of running, baiting, or fighting any" "animal," "or for cock-fighting." It is clear that the object which it was meant to accomplish by these enactments was the putting down places kept and used expressly for such purposes as bull-baiting, cock-fighting and the like. Stat. 5 & 6 W. 4, c. 59, s. 3, indeed, recites that "cruelties are greatly promoted and encouraged by persons keeping" such places, and aiding or assisting therein; and that "the same are great nuisances and annoyances to the neighbourhood in which they are situate, and tend to demoralize such as frequent such places." The present Act, under which the appellant was convicted, stat. 12 & 13 Vict. c. 92, repeals stat. 5 & 6 W. 4, c. 59, and enacts, by sect. 3, that "every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding five pounds for every day he shall so keep or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid; Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding five pounds for every such offence." The language here *285] *used is similar to that employed in the previous statutes, and it is evident that the intention of the Legislature was the same. The words "as aforesaid," in the concluding portion of the section, must mean "in any such place as aforesaid." It is only by systematically and habitually keeping a place for the express purpose of cock-fighting that a person incurs the penalty which the Act imposes. And there is no pretence for saying that the appellant has kept such a place. [WIGHTMAN, J.—The Act was passed for the prevention of cruelty to animals, and the case seems to be within the mischief, if not within the letter, of it.]

No counsel appeared for the respondent.

Cur. adv. vult.

BLACKBURN, J., afterwards delivered the judgment of the Court.(a) This was a case, stated under stat. 20 & 21 Vict. c. 48, for our opinion; in which the question of law was stated to be whether it is an offence, within the intent and meaning of sect. 3 of stat. 12 & 13 Vict. c. 92, to encourage, aid, or assist at the fighting of cocks in any

(a) Thursday, January 26th, 1860.

place, or only in a place kept or used for the purpose of fighting cocks, so as to subject the keeper thereof to the penalty prescribed by the first clause of the said section. The section in question enacts that "every person who shall keep or use or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not *exceeding 5*l.* for every day he shall so keep [*286 or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid; Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof." So far, the meaning of the Act is plain: it creates a substantive offence, namely, that of keeping or using a place for the purpose of baiting animals. The Act then proceeds in the same sentence: "And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid shall forfeit and pay a penalty not exceeding 5*l.* for every such offence." The Legislature here employ words apt if intended to describe the accessories to the offence already created, but not apt if intended to create a fresh offence. It cannot be supposed that the Legislature intended that those who are the principals in fighting the animals should be exempt from the penalty imposed on those merely encouraging, aiding, or assisting thereat; and in this view we are much confirmed on looking at the former Act, 5 & 6 W. 4, c. 59, s. 3, for which the present enactment is substituted, and which clearly only affected those who frequented such places. We think, therefore, that the intention of the Legislature was that the penalty should be imposed on those aiding in fighting the animals "as aforesaid," that is, in a place so used as is mentioned before. We do not wish to be understood as confirming what appears to have been the opinion of the justices, that no penalty can be incurred unless the animals are baited in a place, to use the phrase in the case, "regularly kept for that purpose." On this we pronounce no decision, as the justices have not found *the facts to raise this point, nor asked us any [*287 question upon it; the only question submitted to us being, whether it is an offence to assist in cock-fighting elsewhere than in such a place. We think it is not, and therefore our judgment must be for the appellant.

Judgment for the appellant.

CHILDERS v. WOOLER (sued with **PALLISTER**, deceased since action brought, and before plea.) *Nov. 11.*

Defendant, as attorney for P., who had obtained judgment against W. F., took out a writ of *h. fa.* against W. F., which was endorsed in the usual form, the endorsement being followed by these words: "the defendant is a" [blank] "and resides at Redcar, in your bailiwick." The plaintiff in the present action was sheriff of Yorkshire, and he issued a warrant, setting out the endorsement of the writ verbatim. His officer went with the warrant to Redcar, where W. F., the son of the W. F. named in the writ, lived. The son informed the officer that he was

not the person against whom the writ was issued, but that his father, who lived at Coatham, an adjacent village, probably was; and the father subsequently came and admitted the fact. The officer, however, seized the goods of W. F., the son, at Redcar, who afterwards recovered damages against the plaintiff, as sheriff, for the wrongful seizure. Plaintiff brought this action to recover from defendant the amount of the said damages and costs. The first count of the declaration alleged that defendant, by the endorsement, and with the intent that plaintiff should act upon the statement, falsely represented to plaintiff that the W. F. named in the writ resided at Redcar, whereby plaintiff was induced to seize. The second count alleged that defendant negligently and improperly, but with the view and intent that plaintiff should act upon the statement, endorsed the writ with a direction and statement to plaintiff that the W. F. named in the writ resided at Redcar; whereby plaintiff, acting on such statement, seized. The third count alleged that defendant, by the endorsement, required and directed plaintiff to seize the goods of W. F., residing at Redcar: and that plaintiff, acting on such direction, seized.

Plea, that defendant had good reason to believe, and did believe, that the W. F. named in the writ resided at Redcar; and that defendant so endorsed and delivered the writ with no other intent or view than to furnish such information as he believed to be true for assisting plaintiff, as sheriff, in duly ascertaining whether there were within his bailiwick goods and chattels of the said W. F. named in the writ; and that, save by such endorsement and delivery, defendant did not state or represent, or make or give any direction or statement to plaintiff, or direct or require plaintiff to do, as in the declaration alleged.

On demurrer, held (dissentiente Wightman, J.), that the action was not maintainable, the representation alleged in the first count not having been fraudulently made: the second count not alleging or showing any duty in defendant, as between himself and the sheriff, to make the statement in question: and the endorsement not amounting to a direction to the sheriff, as alleged in the third count, but being merely a statement by defendant for the purpose of affording information to the sheriff, leaving him a discretion as to acting upon it.

THE first count of the declaration stated that plaintiff was sheriff
 *288] of the county of York, and that *defendants caused to be delivered to plaintiff, as such sheriff, a writ of fieri facias, sued out of the Court of Exchequer at the suit of James Pallister, against the goods and chattels of one William Fairbridge, which said writ was endorsed with a direction to the said sheriff to levy 9*l.* 19*s.* 10*d.* "And defendants then, by an endorsement on the said writ, and with a view and intent that plaintiff should act upon the statement contained in the said endorsement, falsely stated and represented to plaintiff that the said William Fairbridge in the said writ named, and against whose goods and chattels it was issued, then resided at a place called Redcar, within the said bailiwick." Averment, that plaintiff, confiding in the said statement and representation, and believing the same to be true, and not knowing or having any notice to the contrary thereof, was thereby induced to, and did, in execution of the said writ as such sheriff, enter the dwelling-house of a certain person in Redcar aforesaid, answering to the description given in and by the said endorsement, to wit, the dwelling-house of the only William Fairbridge who resided at Redcar aforesaid, and did seize and take certain goods and chattels therein of that person, such person not being the said William Fairbridge in the said writ named, and the said goods and chattels not being the goods or chattels of the said William Fairbridge in the said writ mentioned: that plaintiff was induced and caused by the said statement and representation to believe, and that he thereby had reason to believe, and bonâ fide did believe, that the said house, goods and chattels were the house, goods and chattels of the said last-mentioned William Fairbridge: whereas in truth and in fact the said William Fairbridge in the said writ mentioned, and against whose goods and
 *289] chattels it was *issued, did not, at the time of defendants making the said false statement and representation, or at any

of the times aforesaid, reside at Redcar aforesaid: that, upon discovering and ascertaining the falsity of the said statement and representation, and that the said entry and seizure and taking were unlawful, he, plaintiff, withdrew from the possession of the said goods and chattels, and quitted the said dwelling-house, and ceased all further execution of the said writ therein. That, plaintiff's entry upon the said dwelling-house and seizure and taking of the said goods and chattels being unlawful, the said person, whose house and goods and chattels were so respectively entered upon and seized, afterwards brought an action against plaintiff to recover the damages by him sustained by reason of the said entry and seizure and taking of the said goods and chattels, and continuing in the said house, and whereby the character and reputation of that person were injured. That the said person, by the judgment of the Court, recovered against plaintiff 87l. 5s. 6d. damages: and plaintiff thereupon became and was liable to pay and did pay the said person the same; and plaintiff by reason of the premises was injured, and was also put to and incurred costs and expenses in and about appearing to the said action, and defending himself against the same, &c.

The second count stated that defendants caused the said writ of fi. fa. to be delivered to plaintiff to be executed as in the first count mentioned, the same being also endorsed as therein mentioned; and that defendants, carelessly, negligently, and improperly, but with the view and intent that plaintiff should act upon the direction and statement next hereinafter mentioned, endorsed the said writ with a direction and statement to *plaintiff, so being such sheriff as aforesaid, [*290 that the said William Fairbridge in the said writ named, and against whose goods and chattels it was issued, then resided at a place called Redcar, in the said sheriff's bailiwick, whereby plaintiff, acting upon such direction, and confiding in the said statement, and thereby believing that the said William Fairbridge in the said writ named did reside in the said place called Redcar, did enter, &c. Averment (as in the first count) that the said W. Fairbridge did not reside there, and that plaintiff, on ascertaining it, withdrew from further possession and execution.

Third count. That defendants having caused the said writ of fi. fa. to be issued and endorsed, and delivered to plaintiff to be executed, as in the first count mentioned, directed and required plaintiff, to wit, by the endorsement upon the said writ, to execute the said writ by seizing and taking the goods and chattels of William Fairbridge, who then resided at Redcar, in the said sheriff's bailiwick, as and for the goods and chattels of the said William Fairbridge in the said writ mentioned; and plaintiff, acting upon the said direction and request, and bonâ fide believing that William Fairbridge, who resided at Redcar aforesaid, was the same person as the William Fairbridge in the said writ named, and that the goods and chattels of the said William Fairbridge of Redcar were the goods and chattels of the said William Fairbridge in the said writ mentioned, and not knowing the contrary thereof, did, in execution of the said writ, and in consequence of the said direction, as such sheriff, enter into and upon a certain dwelling-house, to-wit, the dwelling-house of the only William Fairbridge who resided at Redcar aforesaid, being another and different

person than the said William Fairbridge in the said writ mentioned, *291] and did seize and take the goods and chattels *therein of the said William Fairbridge, of Redcar aforesaid, as and for the goods and chattels of the said William Fairbridge in the said writ mentioned: when in truth and in fact the said William Fairbridge in the said writ named did not reside at Redcar aforesaid, and the said goods and chattels so seized and taken were not, at the time of the delivering of the said writ to the plaintiff or at the time of the said direction and request, or at any other time, the goods or chattels of the said William Fairbridge in the said writ mentioned, but the same then and afterwards were the goods and chattels of the said other person named William Fairbridge. Averment: that, upon his discovering and ascertaining that fact, plaintiff withdrew from the possession, &c. (as in the first count).

Second plea, by defendant, Wooler.—That at the time of the making of the said endorsement as to the place of residence of the said William Fairbridge named in the said writ, and also at the time of the delivery of the said writ so endorsed to the plaintiff, as such sheriff as aforesaid, he, said defendant, had good and probable reason to believe, and then did in good faith believe, that the said William Fairbridge named in the said writ resided at the said place called Redcar; that defendant so endorsed and delivered the said writ with no other intent or view than to furnish such information as he believed to be true for assisting plaintiff, as such sheriff as aforesaid, in duly ascertaining whether there were within his bailiwick, as such sheriff as aforesaid, goods and chattels of the said William Fairbridge named in the said writ; and that, save or otherwise than by so endorsing the said writ, or by delivering the same endorsed, as in the declaration *292] mentioned, to plaintiff, he, *defendant, did not state, or represent, or make or give any direction or statement to plaintiff, or direct or require plaintiff to do, as in the declaration alleged.

Demurrer. Joinder in demurrer.

Issues of fact were also raised; and the cause came on for trial before Byles, J., at York Spring Assizes, 1859, when a verdict was found for the plaintiff for 124*l.* 14*s.* 3*d.*, subject to the opinion of this Court upon a special case.

The case (of which the pleadings formed part) stated, among other matters, that the plaintiff was the sheriff of Yorkshire, and the defendant Wooler was the attorney for James Pallister, in the suit of Pallister v. Fairbridge. Pallister recovered judgment against Fairbridge for 91*l.* 19*s.* 10*d.*; and Wooler, as Pallister's attorney, took out a writ of fi. fa. for that amount. The writ, which described the execution-debtor as "William Fairbridge," was endorsed as follows: "Levy 91*l.* 19*s.* 10*d.* and 1*l.* 10*s.* for costs of execution," &c. "This writ is issued by" C. & B., "agents for Octavius Borrodaile Wooler, of Darlington, in the county of Durham, attorney for the said James Pallister. The defendant is a" [blank], "and resides at Redcar, in your bailiwick." The plaintiff, by his under-sheriff, issued a warrant directed to one Armitage, the sheriff's officer, in which the endorsement of the writ was set out verbatim. Neither the plaintiff, the under-sheriff, or the sheriff's officer, had any knowledge of the person against whose goods the execution was issued, save what they derived

from the endorsement of the writ; and they and the defendant acted *bonâ fide* in the matter. The sheriff's officer went, with the warrant, to the house of William Fairbridge, at Redcar, the son of the William Fairbridge named in the writ, and the only person of that name in the place; and informed him of the *execution. He said he [*293 knew nothing about it; and, in answer to the officer, said that there was no other person of that name in Redcar, and that his father, William Fairbridge, who lived at Coatham, might be the man. The officer, however, took possession of the goods of the son at Redcar. Immediately after the seizure, William Fairbridge, the son, brought his father to the officer; and the father informed him that he was the William Fairbridge against whom the writ was issued, and showed him the writ of summons in the action. The officer retained possession of the son's goods, and did not seize the father's; and wrote to inform Wooler of the seizure. Afterwards, by Wooler's directions, the execution was withdrawn. William Fairbridge, the son, then sued the plaintiff for the wrongful seizure, and recovered damages. Coatham is in a different parish from Redcar, but close to it, the nearest houses being about fifty yards apart, with a road between them. Letters for residents at Coatham are generally addressed "Coatham, Redcar."

The question for the opinion of the Court was, Whether the plaintiff was entitled to recover from the defendant the whole or any part of the damages and costs recovered from the plaintiff by William Fairbridge, the son.

Manisty, for the plaintiff.—The plaintiff is entitled to recover. The *bona fides* of the defendant would not affect his liability for the damage he has caused to the plaintiff by negligently endorsing the writ. For such negligence, inasmuch as it was in the performance of an act which was to lead the plaintiff to take a particular course, the taking of which caused the plaintiff a loss, the defendant is liable. [COCKBURN, C. J.—Do you rely on the third count? Was there anything equivalent to *a direction by the defendant to the plaintiff?] [*294 There was. [HILL, J.—What duty do you say there was in the defendant to direct the sheriff at all?] If he did direct him at all, he was bound to direct him correctly: and he is liable for gross negligence, such as this, in wrongly directing; just as a gratuitous bailee is liable for gross negligence in respect of the chattel of which he undertakes the charge. [COCKBURN, C. J.—I am inclined to think that it is the duty of the attorney of the execution-creditor to enable the sheriff to execute the writ properly. If the attorney wilfully or negligently withholds the necessary information, he would, I think, be guilty of negligence as between attorney and client.] Here was more than a mere suppression of information. There was a wrong direction. No name was given on the back of the writ, but only the alleged address of the defendant in the suit; who, in the body of the writ, was described as "William Fairbridge": the endorsement, therefore, coupled with the writ, amounted to a direction to seize the goods of William Fairbridge, of Redcar. The defendant gave that direction as the authorized agent of the plaintiff in the suit, and must therefore, according to the rule laid down in *Collen v. Wright*, 7 E. & B. 301

(E. C. L. R. vol. 90), (α) be considered as warranting the truth of his statement. [COCKBURN, C. J.—I should be inclined to be with you, but for *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48).] In that case the defendant, though giving inaccurate information to the sheriff, left him at liberty to act upon his own responsibility; here, as in *Humphrys v. Pratt*, 5 Bligh N. S. 154, which was distinguished from, and recognised by the Court in, *Collins v. Evans*, the defendant, by *295] what was equivalent to an express direction, made the sheriff his agent for the purpose of taking the goods; and is therefore liable for the inaccuracy of that direction, though he may at the time have believed it to be true. [BLACKBURN, J.—In *Rawlings v. Bell*, 1 Com. B. 951 (E. C. L. R. vol. 50), it was held that, to enable the party injured by an untrue representation to sue the party making it, knowledge by the latter of the untruth of the representation was necessary.] There the wife had signed a distress-warrant, having no right to do so, the property being in trustees under her marriage settlement; and the action was by the broker, against the husband and wife, for damage caused to him through his acting upon the warrant. The ground of the decision there was, that, as there could be no retainer of the plaintiff to distrain given by the wife; nor any contract by her to indemnify him, her representation, being *bonâ fide*, did not render her liable, though it was untrue in fact. [HILL, J.—The Court seems to have thought that, if the husband had signed the warrant, he would have been liable.] *Randell v. Trimen*, 18 Com. B. 786 (E. C. L. R. vol. 86), and *Lewis v. Nicholson*, 18 Q. B. 503 (E. C. L. R. vol. 83), are authorities in favour of the plaintiff.

[The argument, on either side, as to the amount of damages is omitted.]

T. Jones (Northern Circuit), for the defendant.—First, it can hardly be said that the representation was untrue in fact, looking at the proximity of Redcar and Coatham. [WIGHTMAN, J.—I think we must take it that the representation was untrue in fact.] Next, if it were, the defendant is not liable. There was nothing which *296] amounted to a direction by him. [COCKBURN, C. J.—What do you say the meaning of the endorsement was?] It meant, “I request you to look out for the person named in the body of the writ, who lives at Redcar.” [WIGHTMAN, J.—“And, when you have found him, seize his goods.”] Even if there were anything amounting to such a direction, that would not absolve the sheriff from the duty of exercising reasonable care and diligence. He did not do that; for he was told that there were two persons of the same name, one living at Redcar, the other at Coatham; and he made no inquiries. [WIGHTMAN, J.—In *Pasley v. Freeman*, 3 T. R. 51, there was this distinction, that the plaintiff was a free agent; here the plaintiff was not.] The sheriff was not bound to act upon the direction. At the most, he was only bound to seize certain goods; being at the same time directed that the execution-debtor lived at Redcar. That direction cannot be considered as a guarantee absolving the sheriff from any responsibility for seizing goods not belonging to the execution-debtor, as to whom the party endorsing the writ merely gives the best information he can. *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), is in favour of the defendant. [COCKBURN, C. J.—There the declaration

(α) Affirmed in Exch. Ch., *Collen v. Wright*, 8 E. & B. 647 (E. C. L. R. vol. 92).

contained no allegation that the defendant directed and required the plaintiff to seize. The sheriff there asked which was the right man. Here the defendant, *proprio motu*, does that which the plaintiff alleges amounted to a direction.] There was no direction to him to act independently of all other information, and without any further inquiry. The plaintiff probably relies on *Jarmain v. Hooper*, 6 M. & G. 827 (E. C. L. R. vol. 46). But there it was assumed that, independently of any question of endorsement, there was an order to seize the goods: and the *question was, whether, upon that assumption, the defendant was liable for the act of his attorney. *Humphrys v. Pratt*, 5 Bligh N. S. 154, rests upon the same principle as *Adamson v. Jarvis*, 4 Bing. 66 (E. C. L. R. vol. 13): namely, that when one man, by his representation, induces another to alter his position, the untruth of the representation makes the party giving it liable, even though he believed it at the time to be true. *Humphrys v. Pratt*, therefore, does not affect the present case.

Manisty was heard in reply.

Cur. adv. vult.

The Court differing in opinion, the following judgments were delivered.(a)

WIGHTMAN, J.—The plaintiff in this case was the sheriff of Yorkshire, and the defendant was the attorney for one James Pallister, in an action at his suit against one William Fairbridge, in the Court of Exchequer, in which there was judgment against William Fairbridge for 91*l.* 19*s.* 10*d.* The defendant Wooler, as the attorney for the plaintiff in that suit, caused a writ of *fi. fa.* to be issued upon that judgment, and caused to be put upon the writ the usual endorsement of the amount to be levied and the names of the attorneys for the plaintiff, followed continuously by these words, “the defendant is a” [blank], “and resides at Redcar, in your bailiwick.” The sheriff’s officer thereupon went to Redcar, found a William Fairbridge there, who said he was the only William Fairbridge at Redcar, but that he knew nothing of the *matter, and that there was another William Fairbridge, his father, who lived at Coatham; whereupon the officer took possession of the goods of William Fairbridge of Redcar, and sent to the defendant Wooler, to inform him of what had passed. It turned out that the person against whom the execution really issued was the William Fairbridge of Coatham, and not the William Fairbridge of Redcar whose goods were seized. William Fairbridge of Redcar brought an action against the sheriff for seizing his goods, and recovered damages against him; and the question now is, whether the sheriff has any remedy over against Wooler, the present defendant, under the above circumstances, and, if he has, whether the present is the proper form of action; it being agreed that both parties acted *bonâ fide*, Wooler believing that Fairbridge of Redcar was the right man, and the sheriff and his officer having no knowledge of the person intended by the execution, except that which they derived from the endorsement upon the writ.

The sheriff is bound at his peril to execute the process delivered to him; and, if it be process of execution against the person, he must take care to take the right man, and, if it be process against the goods, to take the goods of the person against whom the process issues. He

must, it is said, in case of doubt, make inquiry himself, and act upon the result at his own peril. It may be, and indeed was, contended for the sheriff, that this rule of law acted with peculiar hardship upon him, in cases where it happened that there were two persons of the same name, either of whom might be the defendant in the action. The sheriff is bound to execute the writ; but, not knowing which of them is the person who has been sued by the plaintiff, it seems to be obvious that the proper person of *whom he should inquire is *299] either the plaintiff or the plaintiff's attorney; and that, if they tell him who the person is, he need inquire no further. In the present case, the sheriff was already informed, by the endorsement upon the writ, that the William Fairbridge, who lived at Redcar, was the person against whom the writ issued. If he had omitted to act upon that statement in the endorsement, and it turned out that the statement was right, he would have been liable for any ill consequence in delaying or refusing to execute the writ according to its exigence. It was contended, for the sheriff, that if the attorney informed him, upon the writ, of the place in his bailiwick where the person against whom the writ issued resided, it was his duty to take care that his information was correct; and that if, in consequence of the sheriff relying upon that information, he should take the goods of the wrong person, the ill consequences should be ultimately borne by the person who, by his negligence in not taking care to be right in the information he gave to the sheriff, who was bound to act, had been the cause of such ill consequences. It was, however, said in answer that, however this might be, if the question arose for the first time, it was already decided in the defendant's favour by the case of *Collins v. Evans*, in the Exchequer Chamber, 5 Q. B. 820 (E. C. L. R. vol. 48); and undoubtedly this is so, unless that case can be distinguished from the present. In that case *Collins* (an attorney) had issued and delivered to *Evans* (the sheriff) a test. ca. sa. against one John Wright. It happened that the sheriff had in his custody a John Wright of Pell Street, and caused a note to be sent to the attorney (*Collins*) to know *300] whether the John Wright *of Pell Street, whom they had in their custody, was the person against whom the writ was issued; and the attorney *Collins*, by his clerk, returned this answer, "the within defendant is the same person whom we have lodged a ca. sa. against;" and upon this the sheriff detained him, when he would otherwise have been discharged; and the sheriff was obliged to pay compensation to Wright, and brought an action against the attorney to recover damages for the false representation. The Court held that the action was not maintainable, on the ground that fraud must concur with the false statement in order to give a ground of action; and founds its judgment upon the class of cases which begins with *Pasley v. Freeman*, 3 T. R. 51, and of which *Haycraft v. Creasy*, 2 East 92, is the leading authority. As we are bound by the decision, in the Court of error, of *Collins v. Evans*, it is hardly necessary to advert to a distinction, which is not noticed in that case, between the case of a representation made to a person who may act upon it or not at his discretion, whether it be true or false, and one where it is made to a person who is bound at his peril to act upon it, if true, and has no reason or ground for thinking that it is, or may be, false. In such

a case it would seem, both in reason and justice, that far greater care should be exercised by the person giving the information, and that it is a duty in him to take care that it be correct. In *Haycraft v. Creasy*, if the plaintiff had not chosen to act upon the information given by Creasy, he incurred no liability; but in the present case, and in *Collins v. Evans*, the sheriff was bound to act upon the information of the attorney, at the peril of being *liable to an action if he neglected it and it proved to be correct. It is unnecessary to [*301 advert to this, as it is, in effect, an objection to the decision of *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), by the authority of which we are no doubt bound. The Court of Exchequer Chamber, in considering the case of *Collins v. Evans*, were pressed by the decision of the House of Lords in *Humphrys v. Pratt*, 5 Bligh N. S. 154, the circumstances of which appear no further than as they are stated upon the record; by which it appeared that the execution-creditor represented to the sheriff that the judgment-debtor was possessed of goods liable to be seized, and which he would cause to be shown to the sheriff, and required the sheriff to seize such goods; that the sheriff relying upon the representation, did seize goods which were shown him by the execution-creditor, and which he required and directed him to seize as the goods of the debtor, but which turned out not to be his property; in consequence of which the sheriff had to pay damages, and brought his action against the execution-creditor for his false representation; and it was held that the action was maintainable. The report of the case does not state the ground upon which the judgment proceeded, but Lord Tenterden told the reporter, that it proceeded upon the ground of the sheriff "being a public officer, and placed between two fires;" a ground which seems to me perfectly intelligible in the view which I have already mentioned. The Court, however, in the case of *Collins v. Evans*, distinguish the case of *Humphrys v. Pratt*, on the ground that it appeared by the record that the execution-creditor directed and required the sheriff to take the goods which were shown *to him, whereas there was no such allegation in the case of *Collins v. Evans*. In the third count of [*302 the declaration in the present case there is, however, an allegation that the defendant did, by the endorsement on the writ, direct and require the sheriff to take the goods of William Fairbridge, who resided at Redcar, and the question is, whether that is the effect of the endorsement. It is said, on the part of the defendant, to be a mere piece of gratuitous information, leaving the sheriff to his own discretion as to how he would act. I cannot view it in this light. The writ issued by Wooler, as the attorney for the execution-creditor, requires the sheriff to take the goods of William Fairbridge, and as it may be uncertain what William Fairbridge is intended, if there should be more than one, the attorney for the execution-creditor endorses upon the writ that William Fairbridge, of Redcar, is the defendant whose goods are to be taken. How can this be construed otherwise than as a direction to the sheriff to take the goods of William Fairbridge of Redcar? It is not an answer to an inquiry by the sheriff, but is part of the endorsement by which the sheriff is directed how much he is to levy. The sheriff, in case he had delayed executing the writ on the ground of uncertainty, would be bound by

what appeared upon the endorsement if it turned out to be correct; and it appears to me to be quite inconsistent with reason and justice, that the person who binds another by his representation should not be answerable if such representation is false to the prejudice of the person to whom it is made. As, however, it appears to me that the *303] terms of the endorsement amount to a *direction to the sheriff, and that this case is therefore distinguishable from that of *Collins v. Evans* upon the point which seems to be the foundation for the judgment in that case, as distinguishing it from *Humphrys v. Pratt*, I think that upon the third count the plaintiff is entitled to our judgment in respect of the original seizure, though not as to so much of the damages as were given in respect of the sheriff's officer having remained in possession after he had notice from the defendant that he had taken the goods of the wrong man.

COCKBURN, C. J., delivered the judgment of HILL, J., BLACKBURN, J., and himself.

This was an action brought to recover compensation under the following circumstances. The defendant, an attorney, having been employed to conduct a suit on behalf of a Mr. Pallister (who was originally a co-defendant in the present suit, but died pending the proceedings), against one William Fairbridge, and having obtained judgment, caused a writ of fi. fa. to issue against the goods of the defendant in that suit, which writ he caused to be delivered to the present plaintiff, being the sheriff of Yorkshire. On the writ was endorsed (the calling of the defendant, against whom the writ issued, being left in blank), that the defendant resided at Redcar. This was a mistake. The execution-debtor lived at Coatham, but it happened that he had a son of the same name living at Redcar. Redcar and Coatham, though adjoining one another, are, to all intents and purposes, separate and distinct places. On *the receipt of the writ *304] by the sheriff, a warrant was placed in the hands of one Armitage, an officer of the sheriff, in the usual course, to levy the amount endorsed on the writ; whereupon the officer, having found that there was a William Fairbridge living at Redcar, and having no reason to doubt that the description endorsed on the writ was correct, entered, on Monday the 22d of March, on the premises of William Fairbridge the son, and proceeded to take possession of his goods to satisfy the writ. William Fairbridge the son, having first assured the officer that he was not the party against whose goods the execution was directed, went off in search of his father, leaving the officer in possession, and shortly after returned with his father. The latter then explained to the officer that he, and not his son, was the execution-debtor, and, in confirmation of his assertion, produced the original summons directed against himself, in Pallister's suit. The officer persisting, however, in retaining possession, the father and son proceeded together to Darlington, where the present defendant, Wooler, lived, and stated to him what had happened. Wooler, the defendant, thereupon sent a telegraphic message to the officer, stating that the defendant had been with him and had informed him that execution had been levied on the junior instead of the senior, and directing the officer to rectify the mistake if he found it was one. Instead, however, of acting upon these instructions, the officer returned an answer,

by post, to the effect that the writ was against William Fairbridge of Redcar, a butcher, and that the execution must, therefore, be right. In answer to this letter, received by the defendant Wooler on the morning of the 23d, he forthwith despatched a second telegraphic message to Armitage in *these terms: "You are evidently in error; [*305 there was no 'butcher' marked on the writ. The defendant has retired from business, and there is no doubt you have got hold of the wrong man." The defendant had written a letter to the officer to the same effect by the post of the 22d, which letter would also be received by the officer on the morning of the 23d. Nevertheless, it was not till noon on the 24th that the execution was withdrawn. An action of trespass was afterwards brought by William Fairbridge the younger against the present plaintiff; and, judgment having been suffered to go by default, a writ of inquiry was executed, on which the damages were assessed at 40*l.*, and the present action is brought to recover back that sum from the defendant, on the ground that the sheriff, having been led to commit an act of trespass by the fault of the defendant, in pointing out the wrong man as the party against whom the writ was directed, and having had to pay damages in consequence, has a right to look to the defendant for compensation.

The declaration contains three counts. The first count alleges that the defendant, by an endorsement on the writ, and with the intent that the plaintiff should act on the statement contained in the endorsement, falsely stated and represented to the plaintiff that the William Fairbridge against whose goods and chattels the writ was directed resided at Redcar; and that the plaintiff, confiding in this statement, and believing it to be true, and having no knowledge to the contrary, executed the writ accordingly. After which follows a statement of the subsequent proceedings, to the payment of damages and costs by the present plaintiff, at the suit of William Fairbridge the younger. The second count *differs from the first in alleging the endorse- [*306 ment to have been negligently, carelessly, and improperly made. The third count avers that the defendant having issued the writ of *fi. fa.*, "directed and required the plaintiff, to wit by the endorsement on the writ, to execute the writ by seizing the goods and chattels of William Fairbridge, who then resided at Redcar, as and for the goods and chattels of the William Fairbridge in the said writ named." The only plea which is material to the present question is the second, in which the defendant avers, "that he had good and probable reason to believe, and did in good faith believe, that the said William Fairbridge named in the said writ resided at Redcar;" and further, "that he so endorsed and delivered the said writ with no other intent or view than to furnish such information as he believed to be true, for assisting the plaintiff as such sheriff, in ascertaining whether there were any goods or chattels of the said William Fairbridge within his bailiwick."

The first question to be disposed of is, whether the defendant is liable at all in this action. If that question should be answered in the affirmative, there would remain the further question, whether he can properly be held liable for that portion of the damages which may have been awarded against the sheriff in respect of the officer

remaining in possession after he had the means of knowing that an error had been committed.

The first count, which is simply for a false representation, is at once disposed of by the case of *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), in error, and the numerous other authorities which establish *307] that, to support an action for false *representation, the representation must not only have been false in fact, but must also have been made fraudulently. It is plain that this count would have been bad on demurrer, as omitting to allege fraud; while, on the other hand, if the count had been made good by alleging fraud, the issue of fact must have been found for the defendant; it being beyond all question, that the endorsement, though incorrect in point of fact, was made *bonâ fide*, and without any intention to deceive or mislead the sheriff. The second count appears to us equally defective. It neither alleges nor shows any obligation or duty on the part of the defendant, as between him and the sheriff, to make the endorsement, the negligence in the making of which is the foundation of the complaint. Indeed, it is difficult to see how it could do so. As regards the client, it may, indeed, be said that it is the duty of the attorney to furnish the sheriff with the information he possesses as to the residence of the execution-debtor, in order to facilitate the execution of the writ; and that, if he omits to instruct the sheriff, or through negligence wrongly instructs him, so that the execution miscarries, or the client becomes fixed in an action of trespass, he will be liable to the client for negligence in his employment as attorney. But, as regards the sheriff, there can be no obligation or duty, on the part of the attorney, to furnish information as to the residence of the execution-debtor. The sheriff, if he knows who the person is against whom the writ is directed, is bound to execute it, and would not be justified in holding his hand, because the attorney issuing the writ had not endorsed on it the residence of the debtor. The only effect of such an omission would be to give the sheriff, in case of doubt as to the identity of *308] the party, the right *to suspend the execution, and to resort to those means of protection which the law affords him. We are of opinion, therefore, that the negligence of the attorney in such a particular furnishes no ground of action to the plaintiff.

The third count, which alleges that the defendant, by the endorsement on the writ, directed and required the plaintiff to take the goods of the wrong William Fairbridge, presents a question of greater difficulty. The case of *Humphrys v. Pratt*, 5 Bligh N. S. 154, decided in the House of Lords, on appeal, is a conclusive authority for saying that if an execution-creditor directs the sheriff to seize particular goods as the goods of the execution debtor, and the sheriff, believing such instructions to be correct, seizes the goods so pointed out, and in so doing commits a trespass and has to pay damages, he will be entitled to compensation from the execution-creditor. In that case the declaration, after setting forth the issuing of the writ of *fi. fa.*, went on to allege that the defendant "represented and affirmed to the plaintiff that the said Dorothea Power" (the execution-debtor) "was possessed of certain goods and chattels liable to be seized under the said writ, within his bailiwick, which goods the said defendant would cause to be shown to the said plaintiff, and then and there required

the plaintiff to seize the said goods and chattels under the execution." The plaintiff then goes on to aver that, "confiding in the said representation, and believing it to be true, and not knowing to the contrary thereof, he afterwards did seize, at the request and by the directions and at the requisition of the defendant, certain goods and chattels which were shown to him by the defendant, as and for *the goods of [the said Dorothea Power." The declaration then avers that [*309 the defendant deceived and defrauded the plaintiff in this, that the goods and chattels so seized were not the goods and chattels of Dorothea Power, liable to be seized under the writ. It then sets out the subsequent proceedings at the suit of the real owner of the goods seized, whereby the sheriff was fixed with and compelled to pay damages. Error having been brought on a judgment given for the plaintiff by the Court of Exchequer, affirmed afterwards by the Court of Exchequer Chamber, in Ireland; on appeal to the House of Lords, it was there contended in argument, as it has been before us, that it was the duty of the sheriff to inform himself whether the goods were those of the execution-debtor; that he had by law ample powers for so doing; and that, not being under any obligation to seize the goods, merely on the representation made to him by the plaintiff in error, he must be considered as having acted on his own responsibility, and not under the influence of the representation complained of. But the House of Lords, after consideration, decided in favour of the defendant in error (the plaintiff in the action); thereby establishing that if the execution-creditor points out goods as liable to be taken under a *fi. fa.*, and requires the sheriff to take such goods, and the sheriff, believing such representation, and having no knowledge to the contrary, seizes the goods, and in so doing becomes liable to an action of trespass, he is entitled to maintain an action on the case against the party by whose direction he acted. It cannot be questioned that the principle of this decision applies to the attorney in the cause giving such directions, equally with the party to the suit. The case of *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), *with which [we were much pressed on the argument, will be found, on [*310 examination, to have no application to the third count of the declaration in the case before us. That was an action by a sheriff against certain attorneys, for a false representation as to the identity of a person against whom a *ca. sa.* had been placed by the defendants in the sheriff's hands for execution. The facts were, shortly, these. A writ of *ca. sa.* had been issued by a different attorney, against one John Wright, described as of Pell Street, at the suit of one Mosedon. This John Wright being about to be liberated under the Insolvent Debtors Act, and a second writ of *ca. sa.* against a person of the name of John Wright having been lodged with the sheriff for execution, by the defendants, at the suit of one Power, the sheriff, not finding on the writ a description whereby to identify the person against whom it was directed, caused inquiry to be made of the defendants, as to whether the John Wright of Pell Street was the same person with the defendant in the execution at the suit of Power. To this inquiry the defendants answered, erroneously, in the affirmative; in consequence of which the John Wright who was entitled to his discharge was detained wrongfully. The sheriff afterwards, to

avoid an action, paid him 10*l.* as compensation, and brought his action against the defendants to recover the amount. It was held by the Court of Exchequer Chamber, reversing the decision of this Court, that the sheriff was not entitled to maintain an action, and judgment was there given for the plaintiffs in error, the defendants in the action. It was contended before us that that case governed the present, inasmuch as the description of the defendant's residence, endorsed on the writ, amounted to no more than the same information would have *311] done, *if communicated to the sheriff in answer to an inquiry addressed by him to the attorney as to the identity of the party. But the present case is plainly distinguishable from *Collins v. Evans*. In the first place it is to be observed that, in that case, it obviously could not have been the intention to overrule *Humphrys v. Pratt*, 5 Bligh N. S. 154, which was the judgment of a higher Court; and if the declaration had been similar to the present, all that the case could be taken to have decided would be that information given to the sheriff on an inquiry by him is not equivalent to a pointing out of the goods, on the delivery of the writ, as liable to be taken under it. It would still leave open the question whether the indication of the execution-debtor by endorsement on the writ is or is not, in effect, a direction to execute the writ against the party thus pointed out, so as to bring the case within the decision in *Humphrys v. Pratt*. But there is a still more material distinction between this case and *Collins v. Evans*. In the latter, there was no count like the third count in this declaration. The declaration simply alleged that the defendants falsely represented to the plaintiff that the John Wright in custody was the John Wright mentioned in the writ delivered by the defendants to the sheriff. It did not even allege that the representation was fraudulently made. The action thus being for a false representation merely, the case was discussed and decided with reference to the principles which obtain in such an action. Mr. Peacock, who argued for the defendants, put the case on the ground that, in an action for a false representation, the scienter is put in issue; and distinguished *312] the case from *Humphrys v. Pratt* by observing that, in that case, there was an express request, while, in *Collins v. Evans*, 5 Q. B. 820 (E. C. L. R. vol. 48), there was none. "It may be," he says, "that where an execution-creditor points out goods to the sheriff, a jury may infer a request to take: but such a request will be the ground of the action, and must be averred." And Tindal, C. J., in delivering the judgment of the Court, points out with great particularity that the action is for a false representation, with an absence of fraud, or knowledge that the representation was untrue, and that the question for the Court was, whether a representation false in fact, but made without fraud, and in the belief of its truth, affords a ground of action. He distinguishes the case from *Humphrys v. Pratt*, and says there is a ground apparent on the face of the declaration, which will support it, without breaking in on the authority of the decided cases; namely, that the judgment-creditor pointed out the goods and required the sheriff to take them. "He made," says the Chief Justice, "the sheriff his mandatory or agent for the purpose of taking the goods; and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any

other individual in that position, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions." It is plain from this language that, if the defendants in that case had accompanied their answer with any direction that the sheriff should detain the wrong party, and the declaration in the action had been framed accordingly, the Court would have held the case *to be within the decision in *Humphrys v. Pratt*, 5 Bligh N. S. 154; and we come back, there- [*313] fore, to the question, whether the endorsement on the writ is equivalent to a pointing out to the sheriff the person of the defendant, or the goods to be taken, so as to amount to such a direction as was held sufficient to support the action in *Humphrys v. Pratt*; in other words, whether such an endorsement was a requirement to the sheriff, which made him the mandatory or agent of the attorney of the execution-creditor, for the purpose of seizing the goods of William Fairbridge the son; or whether the endorsement was anything more than a mere statement by the attorney, for the purpose of affording information to the sheriff, leaving the sheriff to his own discretion as to how he would act. We are of opinion that the latter is the true character of the endorsement. To construe it in the former sense would be to give it altogether a different meaning from that which it was intended to have. It would in fact have the effect of making the usual endorsement on a writ of execution (which is for the purpose of assisting the sheriff, but not for the purpose of diminishing his responsibility) a means of relieving the sheriff from the responsibility which attaches to his office, by turning the bailiff, to whom the execution of the writ is intrusted, into the agent or special bailiff of the execution-creditor. Many cases have occurred, in which a sheriff has seized pursuant to a similar endorsement; and a question has arisen as to the validity of the seizure, in consequence of some alleged secret act of bankruptcy by the execution-debtor. In those cases it *has never been [*314] thought that the endorsement carried with it an indemnity from the execution-creditor, which would oust the sheriff of the benefit of the Interpleader Act, or would entitle the sheriff to look to the execution-creditor for a reimbursement of any damages which he might be called on to pay, if he had innocently sold in accordance with the endorsement. If it be held that the endorsement has the effect contended for by the plaintiff, the necessary consequence will be, either that no endorsement will in future be made, or the language will be altered to something of the following form: "The defendant is believed to be a ———, and to reside at ———, but the sheriff is left to his own responsibility to ascertain whether such be the fact." The case of *Jarmain v. Hooper*, 6 M. & G. 827 (E. C. L. R. vol. 46), was relied on by the plaintiff as an authority in his favour, with regard to the effect of an endorsement on a writ of execution. In that case, the endorsement was much more specific. The statement was in these terms: "The defendant is an upholsterer and bill broker, and resides at No. 3, Prospect-place, Church-street, Chelsea." The sheriff executed the writ at No. 3, Prospect-place, and seized the goods of Jarmain, the plaintiff in the action. the writ of execution having been against Jarmain the son. The plaintiff claimed the goods after the seizure, whereupon the sheriff applied for relief under

the Interpleader Act, which he clearly was not entitled to do, if the endorsement had the effect now contended for. The execution-creditor, however, attended the interpleader summons by his attorney, and *315] insisted that the goods were rightly *seized; he therefore, by that act, ratified the seizure, which was for his benefit. An issue was directed, to try whether the goods seized were the goods of the claimant. The execution-creditor afterwards declined to try the issue. Upon the argument of the case, the question was, whether the execution-creditor was a trespasser by reason of the seizure by the sheriff; and the learned counsel for the execution-creditor contended that, although the attorney, by his acts, might be a trespasser, yet that he could not make his client such; and he further argued that the adoption of the seizure by coming in under the interpleader rule, was an adoption, not by the execution-creditor, but by his attorney, and that the attorney had no more authority to ratify the act than he had to commit it. As it is clear, therefore, that there was a ratification of the illegal seizure, which had been made for the benefit of the execution-creditor, there was other evidence, in that case, besides the mere endorsement; and the point whether the endorsement had the effect now contended for by the plaintiff was not raised or decided in that action; nor was it necessary that it should be. We therefore think that *Jarmain v. Hooper* is not an authority for the plaintiff in this action; and that the defendant, for the reasons which we have stated, is entitled to the judgment of the Court. There is one point which was not taken upon the argument, relative to the form of the pleadings to the third count. There is an allegation in that count that "the defendant directed and required *316] the plaintiff to execute the writ, by seizing and taking *the plaintiff's goods." That allegation is not traversed, unless it be put in issue by Not guilty. We think the allegation part of the inducement, and that it is not put in issue by Not guilty. If this case should go to a Court of error it may be desirable to amend the record by adding such a plea. We have not referred to it as influencing our judgment, because the case was argued by counsel upon the merits, and not upon technical points of form. Our judgment being generally against the liability of the defendant, it, in strictness, becomes unnecessary to determine how far the liability of a person directing the sheriff to seize, so as to come within the principle of *Humphrys v. Pratt*, 5 Bligh N. S. 154, ceases in respect of damages awarded against the sheriff for continuing the execution after he becomes aware of its being wrongful. We may, however, as well add that we are clearly of opinion that the liability ceases from the time when the sheriff, having acquired a knowledge of the impropriety of the execution, might and ought to have withdrawn it.

Judgment for the defendant.

That a false representation should constitute even an equitable estoppel, it is essential that it should have been made wilfully (*Pickard v. Sears*, 6 Ad. & El. (33 E. C. L. R.) 475; *Howard v.* Hudson, 2 El. & Bl. (75 E. C. L. R.) 1; *Parker v. Barker*, 2 Metcalf 421; *Gray v. Bartlett*, 20 Pick. 186); and so if it consist of mere expression of opinion upon which the party deceived

had no legal right to rely, a contract will not be avoided by the fraudulent intent of the other party (*Clopton v. Comart*, 13 S. & M. 363); and, therefore, as the sheriff is bound to use reasonable diligence in the execution of a writ, and may, if he has reasonable doubts, require indemnity (*Marsh v. Gold*, 2 Pick. 285; *Perley v. Foster*, 9 Mass. 112; *Spangler v. The Commonwealth*, 16 S. & R. 68; *Patterson v. Anderson*, 4 Wright (Pa.), 359; *Jessop v. Brown*, 2 Gill & J. 404;

Levy v. Shockley, 29 Geo. 718; *Perkins v. Pitman*, 34 N. H. 261), it would be a departure from principle and to establish a rule unnecessary and unjust in its particular application, to hold that a direction by the plaintiff (which would have been equally imperative if given by a stranger) could constitute a good cause of action, though given in good faith and with a view of facilitating the officer in the discharge of his duty.

*PERRINS v. THE MARINE AND GENERAL TRAVELLERS' INSURANCE SOCIETY. Nov. 11. [*317]

Defendants, an insurance Company, by their form of proposal for insurance against accidents, required the "name, residence, profession, or occupation of the person whose life is proposed to be insured" to be stated. Plaintiff filled up this form thus: "I. T. P. Esquire, Saltley Hall, Warwickshire." Plaintiff lived at Saltley Hall, but he also kept an ironmonger's shop at D. in the same county. Defendants thereupon insured plaintiff's life against accidents, by a policy under which the rate of premium was the same as would have been payable by plaintiff had he described himself as an ironmonger. In the policy was a proviso "that if any statement or allegation contained in the" "proposal be untrue, or if this policy has been obtained or shall hereafter be continued through any misrepresentation, concealment, or untrue averment whatsoever," "then this policy shall be void."

Held, dissentiente Cockburn, C. J., that the policy was not rendered void by plaintiff's omission to state that he was an ironmonger.

Judgment affirmed in the Exchequer Chamber.

SPECIAL case stated by an arbitrator.

This action was brought on a policy of insurance, effected by the plaintiff with the defendants on 22d August, 1856. The plaintiff, on 21st August, 1856, then and from thenceforth hitherto being an ironmonger, and keeping a shop for the sale of iron ware at Dudley, in the county of Warwick, but living at Saltley Hall, in the said county, directed one George Haslewood Smith, then being an agent of the defendants for the purpose of procuring insurances to be effected with them, to fill up a printed form of proposal for an insurance with the defendants, and to transmit the same to them. The proposal was filled up by the plaintiff's authority, was adopted by him as his proposal, and was in the following words and figures, the parts in italics being written and the remainder printed.

"Marine and General Travellers' Insurance Society,
22, Moorgate Street, London.

"Particulars required from a person proposing to insure against accidents.

"Name, residence, profession, or occupation of the person by whom the proposal is made.

*"G. Haslewood Smith, agent, Handsworth, near Birmingham. [*318]

“Name, residence, profession, or occupation of the person whose life is proposed to be insured.

“*Isaac Thomas Perrins, Esquire, Saltley Hall, Warwickshire.*

“Has the party proposed to be insured ever been afflicted with epileptic or other fits?

“*No.*

“I desire to effect an insurance with the Marine and General Travellers' Insurance Society, on the life of the above *Isaac Thomas Perrins, Esq., Saltley Hall, near Birmingham*, under Class C, Table 1, against death by accident only, with weekly compensation in case of non-fatal accident, in the sum of 1000*l.*, during the period of one year from this date; and I declare that all the above particulars are true, and do agree that this proposal shall form the basis of the contract between me and the said Society.”

(Per pro.) “*Isaac Thomas Perrins.*”

“Date, *August 21, 1856.*”

The defendants thereupon executed and sent to the plaintiff a policy of insurance, dated 22d August, 1856, in the following terms.

Date, 22 August, 1856.

“Whereas Isaac Thomas Perrins, of Saltley Hall, in the county of Warwickshire, gentleman, hereinafter called the insured, hath proposed to effect an insurance with The Marine and General Travellers' Insurance Society, upon his own life, in the sum of 1000*l.* sterling, against death arising from personal injury caused by accident or violence, with compensation in case of non-fatal injury, under Class C, Table 1, first class of the table of rates *of the said Society, *319] and hath delivered to the said Society a declaration and proposal in writing, bearing date 21st August, 1856, setting forth, among other things, his business or occupation,” &c.

The policy also contained the following proviso.

“That if any statement or allegation contained in the aforesaid declaration or proposal be untrue, or if this policy has been obtained, or shall hereafter be continued, through any misrepresentation, concealment, or untrue averment whatsoever, or if any false or fraudulent claim shall at any time be made thereunder, against the said Society, then this policy shall be void.”

The said policy was forwarded to the plaintiff by the defendants, together with a prospectus of the said Society, containing a table of rates of premiums charged by the defendants according to the class of risk insured. In the said table, the first class specified “bankers, professional men, commercial travellers, farmers, clerks, shopkeepers, domestic and agricultural servants, and the public generally not employed in trade.”

The plaintiff sustained bodily injury by reason of an accident.

Garth, for the plaintiff.—The question is, whether the description of the plaintiff in the proposal for insurance avoids the policy. It is contended that it does not. The plaintiff is insured in the first class of risks, and would have been placed in the same class, had he described himself as an ironmonger instead of as an esquire. The same premium, moreover, would have been payable in that case. There has therefore been no fraud upon the defendants, nor have they sustained any injury by the plaintiff's description of himself

*as an esquire. And he was warranted in so styling himself, [*320 for he lives at a private residence apart from the shop where he carries on his business. The designation "esquire" has reference to his social position apart from his business. The defendants will contend that the description is untrue, and that therefore the proviso in the policy applies. No doubt *Anderson v. Fitzgerald*, 4 H. L. Ca. 484, decides that a false statement by the assured will invalidate a policy such as the present, whether or not it be a statement of something that is material. But the plaintiff's statement was not false. The arbitrator does not find that the plaintiff is not an esquire, or that there has been any misrepresentation or concealment.

T. Jones (Northern Circuit), *contra*.—The terms of the proposal in effect require that the person about to insure shall truly state his name, residence, profession, or occupation. The plaintiff has not truly stated his occupation; he has, on the contrary, by describing himself as an esquire, untruly stated that he has no occupation. [WIGHTMAN, J.—The plaintiff would, as an ironmonger, fall within class I.] That is conceded. But the defendants do not undertake to insure every shopkeeper who may propose himself. They require first to be informed of the trade which the applicant carries on. Some trades are more hazardous than others. An ironmonger, for instance, may be exposed to extra risk of accident, by keeping gunpowder for sale, as many do. Had the plaintiff truly described himself as an ironmonger, further inquiry would have been made, which might have resulted in the rejection of his *proposal. In [*321 withholding the fact that he was an ironmonger, he was guilty of a *suppressio veri*, tantamount to a positive statement that he had no occupation. And, that statement being untrue, the policy is thereby avoided, according to the decisions in *Anderson v. Fitzgerald*, 4 H. L. Ca. 484, and *Geach v. Ingall*, 14 M. & W. 95.† [HILL, J.—If "esquire" represents no occupation or profession, the case may be considered as if that word were struck out of the proposal, and the plaintiff had simply given his name. Do you say that he would then have made an untrue statement?] Such an omission to state his occupation would have equally invalidated the policy.

Garth was not heard in reply.

COCKBURN, C. J.—I should be sorry if this defence were to succeed. I own, however, that, with every disposition in favour of the plaintiff, I cannot satisfy myself that the policy is not void within the principle of the decision in *Anderson v. Fitzgerald*. The plaintiff was asked by this Insurance Company what was his profession or occupation: an inquiry which necessarily involves the preliminary question whether he had any profession or occupation. He gives an answer, which does not directly amount to a denial, but which virtually denies that he has any occupation. He says that he is an esquire, and I am willing to take it that he is; but this appears to me to be equivalent to saying that he is an esquire, and nothing else; that is, that he has no occupation. Suppose he had been asked "Are you in trade?" and had replied "I am an esquire," he would *have conveyed the impression that he was not in trade. And [*322 such, I think, is the effect of his answer to the question actually put to him. Then was this answer false? It clearly was.

It may or may not be that the information sought was material; whether or not, the falsity of the answer is fatal to the validity of the policy, according to *Anderson v. Fitzgerald*. I am sorry to be obliged to adopt this view of the case, and am glad that my brothers are of a different opinion; for undoubtedly there would be much hardship in a decision in accordance with what appears to me to be the proper legal principle.

WIGHTMAN, J.—I think that *Anderson v. Fitzgerald* is distinguishable from this case. There, the assured made a direct false statement; here, at most, he has done so only by implication. But it appears to me that there has been a concealment rather than a false statement by the plaintiff. The particulars required of him were, his name, residence, profession, or occupation. He gives his name and residence, and appends to his name the title "esquire." Now it may be that he is an esquire, and it does not appear to be disputed that he is. But then it is said that he is also an ironmonger, and ought to have so stated. The question is, however, is the statement which he did make false in fact? I cannot adopt the view that it is, or that it amounts to a statement that he has no occupation. If false in fact, it would, whether material or not, avoid the policy, according to *Anderson v. Fitzgerald*. But it is true as far as it goes. And as it has not been shown to have been material, and as no fraud was *823] involved in it, it is not such a concealment *as can be held to be within the proviso of the policy. At most, the plaintiff has not stated all that he might have stated. Had he stated even less, and left out the word "esquire" altogether, as my brother Hill suggested, I should still have said that he had made no untrue averment.

HILL, J.—I am of the same opinion. I regret to differ from the Lord Chief Justice in any case; but I should be sorry to be obliged to decide against the plaintiff's just and honest claim. The question is whether there is anything in the plaintiff's statement which is untrue. It is said that he has told an untruth, because, while describing himself as an esquire, he has not said that he is something else besides. This statement, however, is not untrue, but simply imperfect. Suppose that the plaintiff had been a wine merchant and a banker, and had put down only that he was a banker: could it have been said that that was an untrue statement? I think not. Suppose that he had, in addition, been a justice of the peace, and had described himself as a banker and justice of the peace; this, again, would have been the truth, though not the whole truth. Now, by the terms of their contract, the defendants cannot defeat the plaintiff's claim by showing that his statements were imperfect, provided that they were not untrue.

BLACKBURN, J., was absent.

Judgment for the plaintiff.

An omission of the insured person to make any statement in respect to a particular habit, not called for by any general or specific question, is not such a concealment as to avoid the policy: *Rawls v. American Life Insurance Co.*, 36 Barb. 357. See also *Valton v. Na-*

tional Fund Life Assurance Co., 20 N. Y. 32; *Lord v. Dall*, 12 Mass. 115; *Vose v. Eagle Life and Health Insurance Co.*, 6 Cush. 42; *Miles v. Insurance Co.*, 3 Gray 580; *Boggs v. Insurance Co.*, 30 Mis. (9 Jones) 63.

***IN THE EXCHEQUER CHAMBER.(a) [June 14, 1860.] [*324**

(Error from the Queen's Bench.)

PERRINS v. THE MARINE AND GENERAL TRAVELLERS' INSURANCE COMPANY.For head-note, see *antè*, p. 317.

THE defendants appealed against the above decision.

T. Jones (Northern Circuit) was now heard for the appellants, and repeated, substantially, his argument in the Court below.*Garth*, *contra*, was not heard.

WILLIAMS, J.—I am of opinion that the judgment of the Court below was right. It is said that the statement of the plaintiff that he was an esquire was an untrue statement, because it was a suppression of the truth; the truth being that he was also an ironmonger. But there is no foundation for such an argument. The plaintiff said, in effect, I am in that position of life in which people are usually addressed as esquires. A man who is in such a position is no more deserving of the imputation of telling an untruth by calling himself an esquire, without adding his trade, than a peer of the realm would be, who should describe himself as such, and not also state that he was a brewer, banker, or ironmaster, as the case might be.

The other Judges concurred.

Judgment affirmed.

(a) Before Williams, Willes, and Byles, Js., Martin and Channell, Bs.

***WALKER, Appellant, v. The GREAT WESTERN RAILWAY COMPANY, Respondents. Nov. 12. [*325**

An appeal under stat. 20 & 21 Vict. c. 43 does not lie upon the refusal of justices to issue a summons to enforce payment of a highway rate, on the ground that the land assessed was not liable to highway rates.

CASE stated under stat. 20 & 21 Vict. c. 43. The appellant, the surveyor of the highways of the parish of Denchworth, in the county of Berks, on 23d May, 1859, laid an information against the respondents, charging them with having refused to pay two highway rates for the said parish. On the hearing of the summons, before the justices of the peace for the county, at the Petty Sessions held at Wantage, the justices refused to enforce payment of the rates. The case set out the ground of the refusal, which was, in effect, that the justices considered the land assessed to be exempt from highway rates.

Phipson, for the appellant.—The first point raised by the respondents will be, that the provisions of stat. 20 & 21 Vict. c. 43, with respect to appeals against the decision of justices, do not apply to the present case. [HILL, J.—Supposing that we decide for the appellant: would our decisions protect the justices? WIGHTMAN, J.—The justices are not bound to incur any liability by issuing a warrant. Suppose the land were in another parish.] Then the assessment would be void. The rate not being appealed against, the justices ought to have issued their warrant.

Digby, for the respondents, was not called upon.

PER CURIAM.(a)—This is not the proper mode of proceeding.

Appeal dismissed.

(a) Cockburn, C. J., Wightman, Hill, and Blackburn, Js.

***326] *SHACKELL, Appellant, v. WEST, Respondent. Nov. 12.**

Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before justices, under stat. 40 G. 3, c. 99, s. 14, against the pawnbroker for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner. Held, on a case stated, that the order was bad: sect. 14, under which the order was made in effect, applying only to cases of wilful refusal by a pawnbroker to deliver up goods actually in his possession: and that the justices should have made an order under sect. 24, which empowers them to award compensation to the owner if, "in the course of any proceedings" under the Act, they shall find that the goods were lost "through the default, neglect, or wilful misbehaviour" of the pawnbroker.

Semle, that the Court had power to amend the order to one in accordance with sect. 24, under stat. 20 & 21 Vict. c. 43, s. 6.

But, as in such case the appellant would have lost his right of appealing to the Quarter Sessions, under stat. 40 G. 3, c. 99, s. 35, the Court remitted the case to the justices.

CASE stated under stat. 20 & 21 Vict. c. 43.

The case set out a complaint preferred by the respondent against the appellant, a pawnbroker, at the Petty Sessions for Weston-super-Mare, under stat. 40 G. 3, c. 99, s. 14, charging the appellant with having, on 4th May, 1859, without showing reasonable cause to the contrary, unlawfully refused to deliver up to the respondent a watch and chain which had been pawned by him with the appellant, on 4th March, 1859, for an advance of 2*l.*, the respondent having, on the said 4th May, tendered the 2*l.*, and also 1*s.* 4*d.*, the legal interest. On the hearing, the justices held that the appellant had not shown reasonable cause to their satisfaction to the contrary, and adjudged the complaint to be true, and adjudged the appellant forthwith to return the watch and chain, or to pay 5*l.* 2*s.* 8*d.* (their value after deducting the 2*l.* and the 1*s.* 4*d.*) with costs.

It was proved, at the hearing, that the appellant was a pawnbroker, and had received the watch and chain from the respondent, on the day alleged in the complaint, in pledge for 2*l.*; that the respondent, on the day alleged, tendered to the appellant the 2*l.*, and 1*s.* 4*d.*, the legal
***327]** *interest thereon, and that the appellant refused to deliver up the watch and chain, alleging that he was unable to do so in consequence of a burglary having been committed in his house, on the night of 1st May, 1859, when, as he alleged, the watch and chain had been feloniously stolen therefrom.

The case then, after setting out the evidence produced at the hearing, as to the burglary, proceeded as follows:

"It was contended, on the part of the appellant, that, upon the language of sect. 14 of the statute, it was only necessary for the appellant to show reasonable cause by proof of the robbery, which if proved to our satisfaction, the appellant was entitled to have the information dismissed; and that we, the said justices of the peace,

had no jurisdiction over the question as to whether, by diligence, that robbery might have been avoided, that being a question to be determined by a jury, the respondent having still his common law remedy by action, should there have been negligence; and with which remedy it was not the intention of the Legislature the statute under which the complaint was made should interfere. That the question for us on the said complaint was, whether a reasonable cause had been shown for the non-delivery back of the chattel; not whether by care or diligence such cause, be it fire or robbery, might have been prevented: reasonable cause for non-delivery, not reasonable cause for not having indemnified the pawner from the loss of the pledge from such cause. We, however, were of opinion that it was the intention of the Legislature to supersede the necessity of complainants resorting to their remedy at common law, in cases within stat. 40 G. 3, c. 99, s. 14. And that, independently of the suspicious circumstances attending the *alleged burglary (and upon which we refrained from [*328 expressing an opinion), the appellant, having left the premises in which such valuable property was deposited without any person residing or being thereon from the morning of Sunday the 1st May till about 9 o'clock the following morning, and the safe not being, according to the evidence of the appellant's own witness "as well as of other witnesses, a place of sufficient security for valuable articles in a house not having persons living in it, the burglary alleged to have been committed in the night of the said 1st May, if such occurred, must be attributable to the appellant's own laches, and did not constitute, to our satisfaction, any sufficient cause why he should not be ordered either to redeliver up to the respondent the said watch and chain, or, in default thereof, to compensate the respondent for the value of those articles."

J. D. Coleridge, for the appellant.—The conviction was wrong. It must be admitted that, after the decision in *Healing v. Cattrell*,^(a) the appellant cannot contend that the finding of the justices, that he had been guilty of negligence, was wrong. [COCKBURN, C. J.—All that we there held was that there was evidence of neglect within the meaning of sect. 24.] The appellant contends that the order was wrongly drawn up. It must be presumed to have been made under sect. 14 of stat. 40 G. 3, c. 99, as the case states that the complaint was made *under that section, though the order does not, in [*329 express words, purport to be made under it. Now it is clear that the order, if made at all, should have been made under sect. 24. Sect. 14 enacts that "from and after the commencement of this Act, if any goods or chattels shall be pawned or pledged for securing any money lent thereon, not exceeding in the whole the principal sum of 10*l.*, and the profit thereof, and if within one year after the pawning or pledging thereof (proof having been made on oath or affirmation as aforesaid by one or more credible witness or witnesses, and by producing the note or memorandum directed to be given by this Act as aforesaid, before any justice or justices, to the satisfaction of any

(a) Wednesday, November 9th, 1859. Before Cockburn, C. J., Wightman, Hill, and Blackburn, J^s. The only question there raised was as to whether the facts warranted the finding of the justices that there was negligence on the part of the pawnbroker; and the Court pronounced no opinion as to the finality of that question.

such justice or justices, of the pawning or pledging of any such goods or chattels within the said space of one year, or one year and three months, as the case may be), any such pawner or pawners who was or were the real owner or owners of such goods or chattels at the time of the pawning or pledging thereof, his, her, or their executors, administrators, or assigns, shall tender unto the person or persons who lent, on the security of the goods or chattels pawned, his executors," &c., "the principal money borrowed thereon, and profit, according to the table of rates by this Act established, and the person who took such goods or chattels in pawn, his or her executors," &c., "shall thereupon, without showing reasonable cause for so doing to the satisfaction of such justice or justices, neglect or refuse to deliver back the goods or chattels so pawned for any sum or sums of money not exceeding the said principal sum of ten pounds, to the person or persons who borrowed the money thereon, his, her, or their executors," &c., "then and in any such case, on oath or affirmation as aforesaid thereof made *330] by *the pawner or pawners thereof, his, her, or their executors," &c., "or some other credible person, any justice or justices of the peace for the county, riding, division, city, liberty, town, or place where the person or persons who took such pawn as aforesaid, his executors," &c., "shall dwell, on the application of the borrower or borrowers, his, her, or their executors," &c., "is and are hereby required to cause such person or persons who took such pawn, his, her, or their executors," &c., "within the jurisdiction of the justice or justices, to come before such justice or justices; and such justice or justices is and are hereby authorized and required to examine on oath or solemn affirmation, as the case may require, the parties themselves, and such other credible person or persons as shall appear before him or them, touching the premises; and if tender of the principal money due, and all profit thereon, as aforesaid, shall be proved by oath or affirmation as aforesaid to have been made (such principal money not exceeding the said sum of 10*l*.) to the lender or lenders thereof, his, her, or their executors," &c., "by the borrower or borrowers of such principal money, his, her, or their executors," &c., "within the said space of one year, or one year and three months, as the case may be, after the said pawning or pledging of the goods or chattels, then on payment by the borrower or borrowers, his, her, or their executors," &c., "of such principal money, and the profit due thereon as aforesaid, to the lender or lenders, his, her, or their executors," &c., "and in case the lender or lenders, his, her, or their executors," &c., "shall refuse to accept thereof, on tender thereof to him, her, or them made by the borrower or borrowers thereof, his, her, or their executors," &c., "before any such justice or justices, such justice *331] or justices shall thereupon, by order under *his or their hand or hands, direct the goods or chattels so pawned forthwith to be delivered up to the pawner or pawners thereof, his, her, or their executors," &c., "and if the person or persons who shall have lent any principal sum or sums of money, not exceeding in the whole the said sum of 10*l*. on any goods or chattels pawned, his, her, or their executors," &c., "shall neglect or refuse to deliver up or make satisfaction for the goods or chattels which shall be so proved to the satisfaction of such justice or justices as aforesaid to have been

so pawned, as any such justice or justices of the peace as aforesaid shall order and direct, then any such justice or justices shall, and is and are hereby authorized and required to commit the party or parties so refusing to deliver up or make satisfaction for the same" "without bail or mainprise, until he, she, or they shall deliver up the goods or chattels so pawned, and continuing redeemable as aforesaid, according to the order of such justice or justices as aforesaid, or make such satisfaction or compensation as such justice or justices shall adjudge reasonable for the value thereof, to the party or parties entitled to the redemption of such goods or chattels so pawned, and continuing redeemable as aforesaid." That section applies only to cases where the article pawned is still in the possession of the pawnee, and he contumaciously refuses to deliver it up. Here the pawnee was not guilty of any wilful refusal to deliver: the delivery had become impossible; there was therefore "reasonable cause" for the non-delivery, even assuming that the appellant had been guilty of negligence; and the only order which the justices ought to have made under the circumstances was an order, under sect. 24, not for the delivery of the article, but for satisfaction to the pawner. Sect. 24 enacts that "if in the course of *any proceedings before any justice or justices [*332 of the peace, in pursuance of or under this Act, it shall appear, or be proved to the satisfaction of the justice or justices upon oath," "that any of the goods and chattels pawned as aforesaid have been sold before the time allowed by this Act, or otherwise than according to the directions of this Act, or have been embezzled or lost, or are become or have been rendered of less value than the same were at the time of pawning or pledging thereof, by or through the default, neglect, or wilful misbehaviour of the person or persons with whom the same were pledged or pawned, his, her, or their executors, administrators or assigns, agents or servants, then, and in any such case it shall be lawful for every such justice and justices, and he and they is and are hereby required to allow and award a reasonable satisfaction to the owner of such goods or chattels in respect thereof or of such damage;" the sum so allowed or awarded, if not amounting to the principal and profit, to be deducted from the principal and profit due on the pledge; "and in all cases where the goods and chattels pawned as aforesaid shall have been damaged as aforesaid, it shall be sufficient for the pawner or pawners, his, her, or their executors," &c., "to pay or tender the money due upon the balance, after deducting, out of the principal and profit as aforesaid, for the goods or chattels pawned, such reasonable satisfaction in respect to such damage as any such justice or justices shall order or award, and upon so doing the justice or justices shall proceed as if the pawner or pawners, his, her, or their executors," &c., "had paid or tendered the whole money due for the principal and profit aforesaid; and if the satisfaction to be allowed and awarded to the owner or owners" "shall be equal to or exceed the principal and *profit aforesaid, then and in such case the" [*333 pawnee, his executors, administrators, or assigns, "shall deliver the goods" "to the owner or owners thereof, without being paid anything for principal or profit in respect thereof, and shall also pay such excess (if any) to the person or persons entitled thereto, under the penalty of 10*l.*, to be recovered" by distress. Ex parte Cording,

4 B. & Ad. 198 (E. C. L. R. vol. 24), shows the distinction between the two sections; and that, under sect. 24, there is no power of commitment in default of satisfaction being made. Under this order the appellant might have been committed. [BLACKBURN, J.—In *Great Western Railway Company v. The Queen*, 1 E. & B. 874 (E. C. L. R. vol. 72), the Court of Exchequer Chamber seem to have doubted whether a peremptory mandamus could issue commanding the performance by a railway Company of an Act which had become impossible since the return to the writ.] That case and *Rex v. Round*, 4 A. & E. 139 (E. C. L. R. vol. 31), are in favour of the appellant. The fact that, under sect. 24, there is no power of commitment, shows that sect. 14, which does give a power of commitment, was intended to apply to a contumacious refusal to deliver, for which a commitment would be a proper punishment, and sect. 24 to a non-delivery by reason of negligence, for which it would be manifestly unjust to commit. The justices here, therefore, were wrong in making an order for the delivery of the chattel, reasonable cause for its non-delivery having been shown, even though that cause arose from the negligence of the pawnee. [BLACKBURN, J.—Cannot we amend the order under stat. 20 & 21 Vict. c. 43, s. 6?]

*334] **Kinglake*, Serjt., for the respondent.—No amendment is necessary. Even conceding that a loss by burglary caused by the appellant's neglect would be a "reasonable cause," under sect. 14, for the non-delivery of the chattel, the objection raised by the appellant is only technical. The order shows that the justices really considered the appellant to have brought himself within sect. 24. [COCKBURN, C. J.—You can hardly contend that the order is not, practically, under sect. 14. BLACKBURN, J.—It is clear that the justices meant to draw up such an order as would lead to the committal of the appellant in case of his refusal to deliver.] The pawnbroker is exempt from the liabilities imposed by sect. 24 only where the loss of or damage to the article pawned occurs without default, neglect, or wilful misbehaviour on his part: *Syred v. Carruthers*, E. B. & E. 469 (E. C. L. R. vol. 96). Here the justices have found that there was such neglect; and the order was intended to carry out the provisions of that section.

J. D. Coleridge, in reply.—It may be admitted that the justices might have made an order under sect. 24: but it is clear that they did not. The complaint was under sect. 14; the appellant gave evidence as to the burglary solely with the view of showing "reasonable cause" for non-delivery under that section: the order was under that section: and the Court will not prejudice the appellant by making an amendment which would, in effect, substitute for an order under one section an order under another which was not in question before the justices at all. [COCKBURN, C. J.—If all the facts *necessary to make an order under sect. 24 good were before the justices, and they had jurisdiction to make an order in that particular form, we have power to amend the order actually made accordingly.] It is open to the Court to remit the case to the justices, to be reheard. [WIGHTMAN, J.—The appellant has not availed himself of his right to appeal to the Quarter Sessions under sect. 85.]

COCKBURN, C. J.—I am of opinion that the order is bad. It was

clearly intended to be made under sect. 14: and I think the construction placed upon that section and sect. 24, in *Ex parte Cording*, 4 B. & Ad. 198 (E. C. L. R. vol. 31), is the correct one, and that the former section applies only where the pawnbroker, still having the goods in his possession, wilfully refuses to deliver them; not where, as appears upon the case here, the pawnbroker is unable to restore the goods in specie. But it is equally clear that the justices might have made an order under sect. 24. That section provides that if, "in the course of *any* proceedings" under the Act, before the justices, it shall appear to their satisfaction that goods pawned have been, among other things, lost "by the default, neglect, or wilful misbehaviour" of the pawnee, the justices may award satisfaction to the pawner. The justices found, upon the facts stated in the case, that the burglary, through which the pawnee alleged, as a defence, that the goods had been lost, was caused by his negligence. I think the fact that the premises were left unprotected for twenty-four hours, was, of itself, sufficient to justify that *finding; and that it was the duty [*336 of the justices to give redress to the owner of the goods under sect. 24. But there is a substantial difference between an order under that section and an order under sect. 14: and they were wrong in making the order under the latter section.

Then comes the question, whether we ought to amend the order under stat. 20 & 21 Vict. c. 43, s. 6. We certainly might do so, inasmuch as all the facts necessary for an order under sect. 24 were before the justices, and they had jurisdiction to make such an order. But, if the order were amended, the appellant would be deprived of the right (which he has hitherto declined to exercise) of appealing, under sect. 35 of stat. 40 G. 3, c. 99, to the Quarter Sessions, and of contesting the decision of the justices upon the facts. I think, therefore, the proper course will be to remit the case to the justices, to be reheard by them with reference to the view of the Act which we have taken.

WIGHTMAN, J.—Sect. 14 was intended to apply only where the pawnbroker, having the power to restore the goods, refuses to do so, not where the goods are lost by his default as in the present case. But sect. 24 does apply to such a loss; and, by that section, if such loss shall happen to the satisfaction of the justices "in *any* proceedings" under the Act, they may order compensation to the owner. Although, therefore, this complaint was initiated under sect. 14, the justices might still have made an order under sect. 24. They have made an order under sect. 14; which is clearly bad. We might amend it under stat. 20 & 21 Vict. c. 43, s. 6. But there is this difficulty in the way; that the appellant would *then lose his right of appeal [*337 to the Quarter Sessions, under sect. 35 of stat. 40 G. 3, c. 99. I think therefore that the case should be remitted to the justices.

(HILL, J., was absent.)

BLACKBURN, J.—Sect. 14 provides for the commitment of the pawnbroker only if, having the power to deliver up the goods pawned, he refuses to do so. Here the justices have, in effect, refused to come to the conclusion that the appellant had not the power to deliver up the goods; yet the order, as made, might have been enforced by commitment. I think it is clearly bad. An order under sect. 24, for

payment of compensation to the owner, would have been good, although the complaint was laid under sect. 14; the justices found that the goods pawned were lost by the negligence of the pawnbroker, and sect. 24 gives them power to order compensation, if they so find, "in the course of any proceedings under the Act." I think that we have power, under sect. 6 of stat. 20 & 21 Vict. c. 43, either to amend the order or remit the case to the justices; and, as the appellant, if the order were amended, would lose his right of appeal to the Quarter Sessions, under sect. 35 of stat. 40 G. 3, c. 99, the better course is to remit the case. Case remitted accordingly, without costs.

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***338] *RIDER, Appellant, v. WOOD and Others, Respondents.**
Nov. 16.

Stat. 4 G. 4, c. 34, s. 3, enacts "That if any" "artificer" "shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and" "having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same," the offender may be committed by a justice to the House of Correction for three months' imprisonment, with hard labour.

Held that, to render an artificer liable under the Act for absenting himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

At the hearing of the information against the appellant, it was proved, on the part of the respondents, that the appellant contracted and agreed with the respondents, at Saltney, on 4th January, 1859, to serve them as an anchor smith and artificer from that day, at certain specified prices, for an indefinite period, determinable on either of the contracting parties giving to the other fourteen days' notice of his or their intention to determine the contract. The appellant was in the employ of the respondents on 4th January, 1859, the day upon which the contract, the subject of the said information, was entered into, and he had been so for some time previously. The respondents have certain rules and regulations to be observed by the workmen employed at their works; it was proved that these rules and regulations had been read to the appellant whilst in the employ of the respondents, that he was acquainted with them, and that he was aware he had to give fourteen days' notice before leaving the employ of the respondents. Two of the said rules and regulations are as follows.

***339] *No. 1 Rule.** "Every man shall have his name entered in the register book kept in the office for that purpose."

No. 2 Rule. "Contractors, foremen, and daymen to give fourteen days' notice into the office before leaving their employment, and to receive the same."

The appellant was considered a "contractor;" he continued to work for the respondents, according to the terms of the said contract, from 4th January, 1859, until 6th August following, upon which day he, together with the other anchor smiths in the employ of the respond-

ents, left the service of the respondents. No verbal notice had been given by the appellant to the respondents of his intention to leave their employ; but, on 23d July, 1859, a notice, of which the following is a copy, was handed by the appellant to William Thompson, the respondents' manager at the works.

"Messrs. Wood, brothers.—In the beginning of January, last year, you reduced our prices, with a promise that, as soon as trade was a little busier, you would give us our price back again. We now earnestly hope and trust that you will fulfil your promise, as we consider that our price is very small indeed, and we hope that you will take it into your serious consideration. If you will not fulfil your promise, we, all the anchor-smiths in your employ, do hereby give to Messrs. Wood, brothers, fourteen days' notice; dated this day, 23d July, 1859. "The Anchor-Smiths of Saltney."

It was admitted that W. Thompson had authority to receive a notice to quit from the men in the employ of the respondents. It was proved that, on 13th August, 1859, one of the respondents for the first time informed the anchor-smiths in a body (the appellant being present) that the above-mentioned notice could not be received; *the respondents denied that they had ever considered the notice a valid one; it was proved that notices given by the men of [*340 their intention to leave the respondents' employ had always been verbal, or written and signed by the men. It was proved and contended, on the part of the appellant, that the appellant was an anchor-smith, and was in the employ of the respondents on the day the said notice was given to the said William Thompson, and was included in the general description at the foot of the notice, "The anchor-smiths of Saltney."

It was further contended, on his behalf, that a verbal notice was sufficient to determine the contract; that notice in civil causes may be by parol, and that the Courts listen with reluctance to objections to the forms of notices; that notices must only be explicit and positive, and therefore that, a fortiori, in proceedings of a criminal nature like this, the said notice with its accompanying circumstances was a good notice; and that on principles of common sense it was a good notice, and determined the services of the anchor-smiths, the appellant being one of them.

We, however, being of opinion that the appellant had contracted and agreed with the respondents to serve them as an anchor-smith and artificer upon the terms and in the manner alleged by them; and that the appellant had not given to the said respondents fourteen days' notice of his intention to determine the said contract, in accordance with the terms thereof, as he ought to have done; considered that the evidence given before us brought the case within the operation of the 3d sect. of stat. 4 G. 4, c. 34, (a) and gave our determination against the appellant. We considered that the *paper-writing handed to W. Thompson by the appellant on 23d [*341 July, 1859, was no notice by the appellant of his intention to determine the said contract; it was not signed either by him or by any other person in his behalf, neither was it signed by any anchor-smith in the employ of the respondents. We considered the paper-

(a) So much of the section as is material is set out, post, in the argument.

writing nothing more than an anonymous communication. It was not proved before us that the appellant had given to the respondents any verbal notice, or any other notice of any description, of his intention to leave their employ; neither was it proved that the appellant had any sufficient reason for absenting himself from the service of the respondents on the said 6th August.

The question of law arising on the above statement therefore is, Was the paper-writing, delivered by the said appellant to the said William Thompson on 23d July, 1859, as hereinbefore mentioned, a sufficient notice by the appellant to the respondents of his intention to determine the contract entered into between them on 4th January, 1859, so as to justify the said appellant in absenting himself from the service of the said respondents on 6th August, 1859?

Welsby, in support of the conviction.—Stat. 4 G. 4, c. 34, s. 3, under which the appellant was convicted, enacts “that if any servant in husbandry, or any artificer” “shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or in any other manner, and” “having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the *342] same, or be guilty *of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same,” the person so offending may be committed by a justice to the House of Correction for three months’ imprisonment with hard labour. If, therefore, the appellant absented himself from the respondents’ service before the term of his contract with them was completed, he was properly convicted. He did so absent himself, unless the notice of 23d July was a sufficient notice of his intention to put an end to the contract and leave his employment. That notice was insufficient for two reasons. First; because it was only conditional upon the respondents’ refusal to advance their workmen’s prices, and the appellant adduced no evidence before the justices that the condition had happened. Secondly; because it was not a notice by the appellant, as an individual, but by the workmen as a body. Though his was the hand selected to deliver it to Thompson, the appellant so delivered it on behalf of all the anchor-smiths. As an individual he was neither bound by, nor can he rely upon it.

J. Brown, for the appellant.—The notice must be construed, as far as possible, in favour of the appellant. It is not to be supposed that the Legislature would require from persons of the appellant’s class of life a strict compliance with all the formal requisites of a notice. The notice, here, was sufficient to put an end to the service. It appears from the case that it was given in due time, and that it was meant by the men as a notice of their intention to leave at the end of a fortnight. Again, it is plain that the offence of which the appellant was convicted amounts to a misdemeanor, for stat. 4 G. 4, c. 34, s. 3, speaks of a servant or artificer being “guilty of any other” *343] “misdemeanor” than the absenting himself from service; thereby implying that it is a misdemeanor so to absent himself. To constitute the offence, therefore, a guilty animus in the appellant must be shown; for the maxim “actus non facit reum nisi

mens sit rea" applies. But it would be too much to say that the appellant wilfully absented himself from his service, by leaving it at the expiration of a notice by reason of which he bonâ fide believed that the service was at an end. *Hearne v. Garton*, antè, p. 66, shows, that, without a guilty knowledge that the notice was invalid, the appellant was not liable to be convicted.

Welshy, in reply.—Every absenting himself from service without lawful excuse by an artificer is a breach of the Act of Parliament. [HILL, J.—Suppose that a workman stops away from his work for a day on the faith of a false statement by a fellow-workman that his master has given him leave to do so. Could he be convicted under the Act?] In such a case the justices would have to consider whether the workman had a lawful excuse. [HILL, J.—Rather, whether or not he knew that he had not a lawful excuse.]

PER CURIAM.(a)—We must remit the case to the justices, with the expression of our opinion that they ought not to convict the appellant unless they find that he absented himself from the service without lawful excuse, knowing at the time that he had not such an excuse.

We give no opinion whether or not the notice of 23d July was a good notice. Even if it was bad, the justices ought not to convict if it was given bonâ fide.

Case remitted to the justices.

(a) Cockburn, C. J., Hill and Blackburn, Js.

*The MANCHESTER, SHEFFIELD, and LINCOLNSHIRE
Railway Company, Appellants, v. WOOD, Respondent. [*344
Nov. 16.

The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), sect. 114, enacts that "every locomotive steam-engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the Company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway."

Held, that a penalty is not incurred under this section, unless the engine using smoke-emitting fuel is so defectively constructed as to be incapable of consuming its own smoke, though used with proper care; that, consequently, no penalty attaches where the engine, though properly constructed on the principle of consuming its own smoke, is so carelessly used on a railway as to emit instead of consume its smoke.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

The case stated, in substance, that an information had been preferred by the respondent, a constable of the borough of Sheffield, against the appellants, for that they, the said Company, on 27th May last, at the township of Brightside Bierlow, in the said borough, did use a certain locomotive engine, numbered 37, then using coal, on the railway of the said Company there situate, such engine not being then constructed on the principle of consuming, and so as to consume, its own smoke, against the form of the statute in such case made and provided; and that, after hearing the parties, and the evidence adduced by them, the said justices did thereupon convict the said Company of the said offence, and did adjudge the said Company, for the said

offence, to forfeit and pay the sum of 5*l.*, and also to pay the sum of 4*s.* for costs.

By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114, it is enacted as follows: "Every locomotive steam-engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be *constructed on the principle of consuming
*345] and so as to consume its own smoke; and if any engine be not so constructed the Company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway."

The appellants having appeared by attorney to answer the said information, it was thereupon proved, on the part of the respondent, that, on Friday morning, 27th May last, about a quarter past four o'clock, he (the respondent) went into Osborne Street, adjacent to the goods station of the Manchester, Sheffield, and Lincolnshire Railway, at Sheffield, and from thence he saw two locomotive steam-engines, numbered respectively 37 and 103, then in the use of the Company, attached to a luggage train, stationary upon the railway of the Company; that the engine No. 37 made black smoke for four minutes continuously before starting; that the train then started, and moved rather slowly, at about seven miles an hour, and black smoke was emitted from the chimney of the said engine, No. 37, for four minutes longer. On behalf of the appellants, the driver and the fireman of the engine, No. 37, were called, and they proved that, on the morning in question, the fire of that engine was made of timber, coal, and coke, about the same quantity of coal as coke; that at the time the engine was stationary water was being taken in; that the engine was constructed on the principle of consuming its own smoke by a jet of steam from the boiler being thrown into the chimney, whereby the smoke would be prevented, and which plan, the witnesses said, was the most effectual and best the engineer to the Company was acquainted with. They also stated that on the morning of 27th May
*346] the engine did not make much *smoke, and that such smoke was a little muddy, but not black. The appellants contended that, as the engine was constructed with apparatus on the best and most scientific and approved principles known for consuming, and so as to consume, its own smoke, and that as, during the period that the engine was alleged to have emitted smoke, the apparatus for the consumption thereof was applied, they had carried out the spirit and meaning of the statute, and were not guilty of the offence charged in the information.

The justices were of opinion that the appellants had committed the offence, inasmuch as the engine was proved to be using coal, and did not, in fact, consume its own smoke entirely.

If the Court should be of opinion that the said conviction was not erroneous in point of law, then the said conviction was to be affirmed; but if the Court should be of a contrary opinion, then the said conviction was to be quashed.

Quain, for the respondent.—The conviction was right. The Act of Parliament requires the appellants to take care that every engine used on their railway shall, if it uses coal or other smoke-emitting fuel, be constructed, not only on the principle of consuming, but so

as actually to consume, its own smoke. The engine here in question was proved to have been using coal, and to have emitted smoke. Assuming, therefore, that the engine was constructed on the principle of consuming its own smoke, the principle failed in the application. That being so, it was incumbent on the appellants to use coke or other smokeless fuel for the engine. By using coal they incurred the penalty imposed by the statute. *Again, even supposing that the appellants could not be convicted, provided that the engine [*347 was constructed on the principle of consuming its own smoke, there was no sufficient evidence that it was so constructed: the only witnesses called for that purpose being the driver and the fireman, who could say nothing more than that the construction was on the best plan that the engineer to the Company was acquainted with. The engineer may not have been acquainted with any sufficient plan.

Mellish, for the appellants.—The conviction was wrong. The justices have decided that the fact of the engine emitting smoke was conclusive to show that the penalty was incurred; they would not enter into any inquiry into the principle on which the engine was constructed. But the fact that smoke was emitted was not at all conclusive. It is quite possible that no smoke would have been emitted had due care been taken by the fireman. The justices ought to have inquired whether he did take due care; they ought also to have ascertained the nature of the principle on which the engine was constructed: for the section, read rightly, imposes the penalty only if the engine is not constructed on the principle of consuming its own smoke. [HILL, J.—It must be taken that an engine, properly constructed on such a principle, would, if properly used, consume its own smoke.] The justices have, without inquiry, virtually decided that the engine was not constructed on such a principle. In consequence, the appellants are rendered liable to a penalty of 5*l.* for every day on which they use the engine; though very possibly, if due care be taken, the engine may never emit smoke again.

**Quain*, in reply.—The Legislature can hardly have intended that the justices should institute a minute inquiry into the [*348 principle of construction adopted in the engine; a question of science upon which they would not be competent judges. The fact that the engine does emit smoke warrants them in finding that it cannot be properly constructed on the principle of consuming its own smoke.

COCKBURN, C. J.—We must send this case back to the justices, that they may investigate the whole matter. They must decide, upon full inquiry, whether the emission of smoke was caused by the faulty construction of the engine or by the carelessness of the persons using it. In the former case a conviction will be right; in the latter it will be wrong.

HILL, J.—The penalty is imposed upon the use of an engine so constructed as to be incapable of consuming its own smoke. If the non-consumption of smoke is caused solely by the want of care of those in charge of the engine, the penalty does not attach; but if it arises from the defective construction of the engine, the penalty does attach. That is a matter into which the justices must inquire.

BLACKBURN, J.—I think that the fact that an engine has been seen to smoke once may be some evidence that it is not properly constructed

on the principle of consuming its own smoke. The justices have treated this fact as conclusive evidence to that effect, whereas it may *349] well be, nevertheless, that the engine was so *constructed that it would not, if fairly and properly used, have smoked at all. The case must therefore go back to the justices, for them to find whether the engine would or would not, under duly careful management, have consumed its own smoke.

Case remitted to the justices.

WILLIAMS v. LAKE. Nov. 18.

Defendant wrote, signed, and handed to T. & O. the following document: "Sir, I beg to inform you that I shall see you paid to the sum of 800*l*. for the ensuing building which you undertake to build for Messrs. T. & O. THOMAS LAKE." He intended it to be handed over by T. & O. as a guarantee to J., who was then negotiating with T. & O. to erect for them the building referred to. T. & O., however, having agreed with plaintiff, instead of J., that plaintiff should erect the building, delivered the document to plaintiff, without defendant's knowledge or authority. Defendant afterwards heard of and ratified this delivery. Plaintiff, having erected the building, sued defendant on the document, as a guarantee.

Held, that the document was not a sufficient written agreement, or note or memorandum thereof, by defendant, to answer for the debt or default of T. & O., within the 4th section of the Statute of Frauds; inasmuch as the name of the person for whom the document was intended did not in any way appear upon the face of it, so that it did not contain the names of both the parties to the contract.

SPECIAL case stated by an arbitrator.

William Owens and John Thomas, of Cap Coch, agreed together to have built for themselves fourteen cottages (seven for each separately), the site of which was chosen by them and the defendant Thomas Lake; and the defendant was to advance money on the security of and mortgage of the proposed buildings. The said William Owens and John Thomas, of Cap Coch, first offered the contract of building to one John Thomas of Cwmbach, but he was willing only to undertake the carpenter's work and not the whole building. The said William Owens and John Thomas, of Cap Coch, then offered the contract to one Thomas Jones, who refused to undertake the work without the signature or some undertaking of the defendant, Thomas *350] Lake. A guarantee *was handed by the defendant to John Thomas, in these words.

"Sir,

"April 27th, 1857.

"I beg to inform you that I shall see you paid the sum of 800*l*. for the ensuing building which you undertake to build for Messrs. Thomas and Owens of Cap Coch.

"I am, Sir,

"Yours, &c.

"THOMAS LAKE."

Thomas Jones, to whom this guarantee was intended to be given, when it was delivered by the said Thomas Lake to John Thomas, refused to undertake the buildings and refused to accept the guarantee. It was, in fact, first offered to Thomas Jones; he took it away in the evening and brought it back the next morning, and said he would have nothing to do with the building, as he had heard a very bad character of Thomas Lake. He brought the guarantee back to

William Owens. After this refusal, and before seeing Thomas Lake again, John Thomas and William Owens agreed with the plaintiff to build the houses; and when they so agreed with the plaintiff, William Owens offered to him the above-mentioned written guarantee of Thomas Lake, without the authority of the said Thomas Lake, and it was accepted by the plaintiff; but the said guarantee was not delivered to the plaintiff until a few days after signing the agreement. The contract for the building was duly made and signed on 9th May, 1857, between the plaintiff and the said John Thomas and William Owens, and was duly stamped. When the guarantee was given by Thomas Lake the plaintiff had not been named to him as the intended contractor for the work, nor was the guarantee intended for him; it was given to the plaintiff about a *week after the building contract [*351] was signed. During the progress of the building, money was advanced by Thomas Lake to John Thomas and William Owens. And I find that Thomas Lake knew that the plaintiff held the guarantee; and that the money paid by him into the hands of John Thomas was paid over, with his knowledge and assent, by John Thomas to the plaintiff. During the progress of the buildings, they were visited and inspected by Thomas Lake. When the building was proceeding, William Owens remonstrated with the defendant respecting the non-payment of a portion of money payable on account of the building to the plaintiff, when the defendant gave him a writing in these words.

"Sir,

"June 9th, 1857.

"I beg leave to inform you concerning William Owens's houses, that you have no need to be in no suspense about it, as I assure you that everything with [sic] required of [sic] you, to have your money is all right.

"I am, Sir, &c.

"THOMAS LAKE."

This written paper was delivered by Thomas Lake to William Owens with the knowledge that the plaintiff was at the time the contractor, and with the knowledge that he held the guarantee signed by Thomas Lake, the defendant. This writing of 9th June was also given by the defendant to William Owens in order to be delivered by William Owens to the plaintiff, though the defendant did not, when he delivered the guarantee of 27th April to John Thomas, authorize him to give it to the plaintiff. I find that, after it was delivered to the plaintiff, defendant ratified and sanctioned the delivery *of the guarantee to him. The name of the plaintiff is not [*352] written on either of the two writings.

The question for the opinion of the Court was, Whether there was a sufficient agreement, memorandum, or note, within the 4th section of the Statute of Frauds.

Norman, for the plaintiff.—The guarantee signed by the defendant is sufficient to satisfy the statute. It is true that this document is addressed to no one in particular, and was, in the first instance, intended for Thomas Jones. After the arrangement, however, between that person and Thomas and Owens had gone off, the latter handed the guarantee to the plaintiff: and although this was done without the authority of the defendant, the arbitrator has found that the defend-

ant subsequently, with full knowledge of the facts, ratified the transaction. [BLACKBURN, J.—Upon the point of ratification, *Maclean v. Dunn*, 4 Bing. 722 (E. C. L. R. vol. 13), is in your favour. But you have this difficulty to surmount, that the guarantee does not contain the name of the plaintiff.] It is sufficient, to satisfy the Statute of Frauds, that the guarantee is signed by the defendant. Signature of a contract by the party to be charged has been held enough, within the statute, ever since the decision to that effect in *Coleman v. Upcot*, 5 Vin. Ab. 527. [HILL, J.—That proposition is indisputable. But, independently of any question as to signature, in order to constitute a document an agreement it must contain the name of each contracting party and the subject-matter of the contract. Otherwise, it is no agreement at all.] *Coleman v. Upcot* decides that a parol acceptance *353] of a written proposal signed by the proposer is *sufficient as against the proposer. So, in the present case, the acceptance by the plaintiff of the guarantee, signed by the defendant, bound the latter. [COCKBURN, C. J.—How can the defendant be bound by the plaintiff's acceptance of that which did not amount to an agreement inter partes?] In *Smith v. Neal*, 2 C. B. N. S. 82 (E. C. L. R. vol. 89), the Court of Common Pleas, in a considered judgment, followed the decision of Kindersley, V. C., in *Warner v. Willington*, 3 Drew. 523, that a proposal signed by the person to be bound, and accepted, by word of mouth, by the person to whom it is made, is a sufficient agreement to satisfy the 4th section of the Statute of Frauds. It is certainly laid down in Welsby's Chitty's Statutes (2d ed.), vol. 2, p. 147, note (a), that "the agreement cannot be enforced unless both the contracting parties be named in it;" but the cases there cited do not bear out the proposition. Even admitting, however, that a formal agreement must contain the names of the parties to it, the same particularity cannot be required in a memorandum or note of the agreement, between which and the agreement itself the language of the 4th section of the Statute of Frauds implies a distinction. The guarantee, in the present case, is but a memorandum of the agreement. Lastly, *Wilson v. Craven*, 8 M. & W. 584,† is an authority in the plaintiff's favour. In that case a guarantee for advances had been given to a joint stock banking company, which afterwards amalgamated with a firm of private bankers and took a fresh name; and it was held that the public officer of the new company might, notwithstanding the change of name and the accession of new proprietors, maintain an action on the guarantee so given to the old company.

*354] **Milward*, contra, was not heard.

COCKBURN, C. J.—I am of opinion that our judgment must be for the defendant. The action is upon a guarantee signed by him, but which turns out to be in blank so far as regards the name of the party to be guaranteed. It is therefore no sufficient agreement, or memorandum of an agreement, within the Statute of Frauds, to answer for the debt or default of another; for it is essential to the validity of any such agreement, or memorandum thereof, that it should contain the names of both the parties to the agreement. It is true that there is no necessity that both parties should sign it; all that is requisite is that it should be signed by the party to be charged. But it must still contain all the essentials of an agreement, and, therefore,

inter alia, the names of both parties. I cannot concur in Mr. *Norman's* view, that any greater laxity in this respect is permissible in a memorandum of an agreement than in an agreement itself. The memorandum is, in effect, the agreement where no more formal document is drawn up. I am the more confirmed in my opinion when I consider the mischief which the Statute of Frauds was intended to prevent. In this very case, supposing the guarantee to be valid, it might have been put into the hands of some person for whom the defendant never intended it; and an attempt might have been made on the one hand to enforce, and on the other to resist, it by parol evidence as to who was really the person intended. Thus a door would be opened to the very fraud which it was the object of the statute to prevent.

HILL, J.—I am of the same opinion. The contract in *this case is one falling within the 4th section of the Statute of [*355 Frauds; and according to the provisions of that section no action can be brought upon such a contract, unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged, or by his authorized agent. Mr. *Norman* has referred to a class of cases which show distinctly that it is not necessary that the party seeking to enforce the agreement should sign it; because the statute does not require his signature. What the statute does require is, that the defendant in the action, or his agent, shall have signed at least some memorandum or note of the agreement. Now, no document can amount to such a memorandum or note unless it specifies upon its face, either explicitly or by reasonable construction, not only the subject-matter, but the names of the contracting parties. Here, the name of the plaintiff nowhere appears upon the guarantee; which, therefore, fails to satisfy the requirements of the statute.

BLACKBURN, J.—I am sorry to be obliged to agree in the judgments which have been delivered; for, in this particular case, the statute is productive of great hardship. Independently of any authority I should have said that no document can be an agreement, or a memorandum of one, which does not show on its face who the parties making the agreement are. Nothing could better illustrate this than the document here in question. [His Lordship read the guarantee.] The defendant handed this document to Thomas in order that he might deliver it to the person meant in it by "you." At that time Thomas Jones was this person; now, Williams, the plaintiff, would be the *person. In order to ascertain who is the person, parol evi- [*356 dence is necessary; evidence which it was the object of the Statute of Frauds to exclude in all these cases. No case can be cited in which a person not named in an agreement has been held to be entitled to recover upon it. On the other hand, *Champion v. Plummer*, 1 New Rep. 252, is an express decision that the absence of the name of one of the contracting parties is fatal to the validity of a written document falling within the provisions of the 17th section of the Statute of Frauds. Sir James Mansfield, C. J., there says, 'how can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties?' That ques-

tion is equally unanswerable whether the case be one under the 17th section of the statute, or under the 4th. Judgment for the defendant.

A memorandum in writing of a contract for the sale of lands is not a sufficient memorandum, within the meaning of the Statute of Frauds, unless it in some way shows who are the two parties to the contract: *Sherburne v. Shaw*, 1 N. H. 157; *Nichols v. Johnson*, 10 Conn. 192; *Osborn v. Phelps*, 19 Id. 63. And it must appear who is the buyer and who the seller: *Bailey v. Ogden*, 3 Johns. 399; *Manufacturing Co. v. Goddard*, 14 How. 446

So, where a letter of credit was addressed by mistake to John and

Joseph, and delivered to John and Jeremiah, it was held the latter could not maintain an action upon it for goods furnished by them on the strength of it: *Grant v. Naylor*, 4 Cranch 224. In cases, however, where the statute allows the subscription to be made by the agent of the party to be charged, it is not necessary that the name or existence of the principal should appear upon the instrument: *Dykers v. Townsend*, 24 N. Y. (10 Smith) 57.

WALKER, Appellant, v. EVANS, Respondent. Nov. 19.

Stat. 19 & 20 Vict. c. 107, s. 1, enacts that "all steam-vessels plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light," shall be subject to the same penalties for not consuming their own smoke as are imposed by stat. 16 & 17 Vict. c. 128, upon all steam-vessels above London Bridge.

Held, that a steam-tug not carrying passengers, but employed exclusively in towing ships for hire to and from the docks in the river, occasionally from and to places to the eastward, but generally from and to places to the westward of the Nore Light, was, while employed on any portion of the river between the limits named by the Act, liable to penalties for not consuming its own smoke.

CASE stated on appeal, by a magistrate of the Thames Police Court. The appellant was charged, on the complaint of the respondent, *357] that he, on 16th June, 1859, on the River *Thames below London Bridge, between Limehouse and Blackwall, having charge of a certain steam-vessel named *Tam O'Shanter*, did unlawfully use, in the working of the said vessel, a certain steam-engine or furnace not constructed so as to consume its own smoke.

The *Tam O'Shanter* is a steam-vessel or tug not carrying passengers, but employed exclusively in towing ships for hire to and from the various docks which lie upon the River Thames between London Bridge and the Nore Light. Occasionally, and whenever required, she tows ships from the docks down the river towards the sea eastward of the Nore Light, sometimes as far out to sea as the Downs. In like manner she sometimes is engaged in towing vessels from the Downs and various parts of the river eastward of the Nore Light up to the said docks; but she is for the most part employed in the River Thames to the westward of the Nore Light. She does not ply regularly to any fixed station or place; and when unemployed, she has no regular station, lying generally in the river in the vicinity of the docks; never so high as London Bridge. Her engine and furnace

are not constructed to consume their own smoke, nor in fact do they consume it.

On 16th June, 1859, the appellant, then having charge of her, took in tow a ship at Limehouse, and tugged her down the river to Blackwall, where the *Tam O'Shanter* cast off, returned to her former place of mooring at Limehouse, and blew off her steam.

It was contended, for the appellant, that the *Tam O'Shanter* was not a steam-vessel within the provisions of stat. 19 & 20 Vict. c. 107, s. 1, as not being a vessel plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light.

*The magistrate convicted the appellant.

The question for the opinion of the Court was, whether the [*358 determination was erroneous in point of law.

Hosack, for the respondent.—The conviction was right. Stat. 19 & 20 Vict. c. 107, s. 1, enacts that "all steam-vessels plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light shall be subject to the provisions of" stat. 16 & 17 Vict. c. 128, "relating to steam-vessels above London Bridge;" sect. 2 of which enacts that "every steam-engine and furnace used in the working of any steam-vessel on the River Thames above London Bridge shall be constructed so as to consume the smoke arising from such engine and furnace." The *Tam O'Shanter* falls within the class of vessels described in sect. 1 of stat. 19 & 20 Vict. c. 107. The fact that she occasionally goes to the eastward of the Nore Light is not enough to except her. (The Court then called on the other side.)

Sir Fitzroy Kelly, for the appellant.—The statute is a penal one, and must be construed strictly. It was clearly intended to exclude sea-going vessels. And, even if it were not, a steam-tug, which has no regular termini to its voyages, can hardly be considered as a vessel "plying to and fro between London Bridge and any place on the River Thames," whether to the westward of the Nore or not. The Act applies only to regular passenger vessels. [HILL, J.—The Act is intended to relieve, not only passengers, but the metropolis generally, from the nuisance caused by steam-vessels on the Thames emitting smoke.]

*(*Hosack*, in reply, was stopped.)

COCKBURN, C. J.—We are all of opinion that this vessel is [*359 within the class to which the statutes in question were intended to apply. There was an intention, no doubt, to make a distinction between sea-going vessels and vessels plying between London Bridge and any place westward of the Nore Light; and the Legislature, for the general convenience and comfort of persons living near the river within those boundaries, has enacted that all vessels so plying shall consume their own smoke. The only question is, whether this steam-tug, though she sometimes goes beyond those boundaries, is, while she is travelling between them, a vessel "plying" between those boundaries within the meaning of the Act. The appellant contends that she is not, because those boundaries are not the fixed limits of her voyages: but she is, nevertheless, within the mischief of the statute, if she is passing to or fro, for the time, within those limits. She does, it is true, go occasionally beyond them; but that does not make her a sea-going vessel.

WIGHTMAN, J.—The enactment is not limited to vessels plying strictly between London Bridge and some definite limit to the westward of the Nore. The ordinary occupation of this vessel lies between those limits; and, though she sometimes goes beyond the Nore, she is clearly within the mischief of the statute.

HILL, J.—The words of stat. 19 & 20 Vict. c. 107, s. 1, are “all steam-vessels plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light.”

*360] The case finds that this *vessel “is, for the most part, employed in the River Thames to the westward of the Nore Light.” It is impossible to hold that only the literal words of the statute are to prevail; for, if so, a passenger steam-vessel coming from any place westward of the Nore Light would be exempt if she stopped and landed her passengers, not at London Bridge, but at some place just short of it. The statute is clearly intended to apply to all vessels plying to and fro, for the time, on any portion of the river between the limits named.

(BLACKBURN, J., was absent.)

Judgment for the respondent.

ASHMORE, Appellant, v. HORTON and Another, Respondents. Nov. 19.

Stat. 4 G. 4, c. 34, s. 3, enacts “that if any” “artificer” “shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties),” the offender may be committed by a justice to the House of Correction for a term of not more than three months’ imprisonment, with hard labour, and an abatement of wages.

On 5th July, 1858, A., an artificer, made a written contract with P., signed by A. and P., to serve P. for five years from that date, and then entered into the service. On 15th October, 1858, A., so being in P.’s service, made a written contract with H., signed by them both, to serve H. for five years from this latter date. On the next day A. refused to enter into H.’s service, giving as a reason that P. insisted on his remaining in his (P.’s) service.

Held, that A. could not be convicted, under the above Act, for not entering into H.’s service, if he had a lawful excuse for not entering into it; and that the fact that he could not do so without committing the criminal offence of absenting himself from P.’s service was sufficient to constitute such an excuse.

THIS was a case stated by justices, under stat. 20 & 21 Vict. c. 43, and was substantially as follows.

*361] *The appellant, William Ashmore, was convicted, on 2d January, 1859, on the complaint of the respondents, for not entering into their service, pursuant to a written agreement, for that he, being an artificer, did on 15th May, 1858, by a certain contract in writing, signed by him and the respondents, Joshua and William Horton, contract with them to serve them for five years from the said date, as a boiler and gas-holder maker, but that he had not entered and did not enter into or commence his said service according to his said contract; and the justices adjudged him to be imprisoned for fourteen days, and that a proportionate part of his wages should be abated during his imprisonment.

The appellant, on 15th May, 1858, signed an agreement, which, so far as it is material, was as follows.

“I hereby engage and agree to work for and serve Messrs. W. &

J. Horton" (the respondents) "in the trade of a boiler and gas-holder, for the term of five years, at the weekly wages of," &c. "As witness my hand, this 15th May, 1858."

This agreement was not signed by the respondents until after its date, and there was no proof on what day it was signed by them; but, on 15th October, 1858, the following memorandum was written across the former agreement, and signed by both parties.

"We, the undersigned J. & W. Horton, agree with the undersigned W. Ashmore to hire him from this day for five years, on the terms and conditions of the within document, and I, W. Ashmore, also agree to the same. Dated this 15th October, 1858."

The appellant, on signing, received 9*l*. from the respondents, to defray his travelling expenses to Dundee, where his services were required. He repaid this on the *following day, stating as a reason that one Thomas Piggott, by whom he was then employed, insisted on his remaining in his service. The appellant did not enter the service of the respondents, but continued in the service of Piggott, in whose service he was on 15th May, 1858; and had been for twelve years previously, to the knowledge of the respondents, under a parol agreement of service for an indefinite period, subject to fifteen days' notice of determination on either side; but it was not proved that the respondents knew of this condition. On 5th July, 1858 (between the dates of the other two agreements), the appellant and Piggott, in whose service he then was, in Belgium, entered into, and signed there, an agreement, by which the appellant agreed to work, and Piggott to employ him, in boiler-making and smith's work for five years. [*362]

It was contended, on behalf of the appellant, that the agreement of 15th May was unilateral and void, and that having, on 5th July, entered into a valid agreement with Piggott, the subsequent memorandum of 15th October was also void, because, being under contract with Piggott, the appellant was legally incapable of entering into a valid agreement with the respondents. On the part of the respondents it was contended that the agreement of 15th May, having been voluntarily entered into, was a valid agreement of service, and binding on the appellant without the subsequent confirmation; and at all events, that, confirmed by the memorandum of 15th October, it became binding on him, and could not be defeated by the production of any other or prior agreement voluntarily entered into by him, otherwise, he would be in fact allowed to take advantage of his own wrong.

*The justices determined that the memorandum of agreement of 15th May, renewed and confirmed on 15th October, was a valid agreement of service between the parties, and binding on the appellant, and being in writing, and the appellant not having commenced his service, they convicted him as above. [*363]

The question for the opinion of the Court was, whether the conviction was right in law.

Lush, for the respondents.—The appellant was rightly convicted. Stat. 4 G. 4, c. 34, s. 3, enacts, "that if any" "artificer" "shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and

shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties)," the person so offending may be committed by a justice to the House of Correction for a term of imprisonment not exceeding three months, with hard labour, and the abatement of a proportionable part of his wages. It is not now contended, on behalf of the respondents, that the agreement of 15th May, 1858, was a written contract sufficient to satisfy this enactment; for it was not signed by the respondents. The memorandum, however, of 15th October, written across that agreement and signed by both the appellant and the respondents, was a contract within the statute, and bound the appellant to enter into the service of the respondents, and remain in it for five years from that date. It was not till the following day that the appellant informed the respondents that he was under a prior engagement to serve Piggott. That was too late to relieve him from *364] the obligation which he had come *under to the respondents. By refusing to enter their service, he incurred the punishment provided by the statute, and cannot be allowed to rely upon his agreement with Piggott, as affording him an excuse for his refusal, after his wrongful act in concealing that agreement from the respondents at the time that he made the contract with them. [COCKBURN, C. J.—He may be civilly liable to the respondents. But has he committed the criminal offence contemplated by the Act of Parliament? The Act makes the absenting himself from service by an artificer a misdemeanour, not merely the non-entering into the service. By entering the respondents' service, the appellant would have committed the misdemeanour of absenting himself from Piggott's service.] Not unless the absenting himself from Piggott's service was without lawful excuse. [WIGHTMAN, J.—Is he not lawfully excused from entering the respondents' service by the fact that by so doing he would be unlawfully absenting himself from that of Piggott?] To hold him excused on that ground, would be to allow him to take advantage of his own wrong. One of the objects of the Act of Parliament was to prevent persons of the appellant's class from entering into double and incompatible contracts of service. [COCKBURN, C. J.—Is not an action the respondents' proper remedy? BLACKBURN, J.—Suppose the case of a promise of marriage made by a man already married. He is liable to a civil action for the breach of this contract, though he cannot perform it. But is he also subject to the censure of the Ecclesiastical Courts?] An action would, virtually, be no remedy at all against a person in the station of a mechanic. The proceedings under this statute are not instituted as a means of compelling specific performance, but of punishment for the offence of *365] *contracting to do that which the offender has put it out of his power to do. [BLACKBURN, J.—The Act does not say that a man shall be punished merely for entering into a contract which he knows that he cannot perform.]

Wills, contra.—Wightman, J., has suggested the true test; which is, whether the appellant had a lawful excuse for not entering the respondents' service; Seth Turner's case, 9 Q. B. 80 (E. C. L. R. vol. 58), and Geswood's case, 2 E. & B. 952 (E. C. L. R. vol. 75), are authorities to that effect. The fact that the appellant was already under

contract to serve another master constituted such a lawful excuse. To hold otherwise would be to create an offence not mentioned in the Act of Parliament; that, namely, of entering into a second agreement of service whilst the first was subsisting. If the appellant was properly convicted in the present instance, he is liable to alternate imprisonments on the complaint of the respondents and of his other master, Piggott; and may thus have to spend in prison the whole of the five years of his contract with the respondents. In *Ex parte Baker*, although the Judges of the Court of Exchequer differed on the point, (a) this Court held unanimously, (b) that an artificer who, after his discharge from imprisonment, refuses to return to the same service, for absenting himself from which he was imprisoned, may be again convicted as for a fresh absenting himself from it.

Lush, in reply.—The statute affixes a criminal liability to the breach of a civil contract. Its object is, not to enforce the performance, but to punish the breach of the contract. As to the contention on the other side, that *the appellant, if liable to this conviction, [*366 might spend the whole of the five years in prison, the answer to it is that, if he were brought before the magistrates a second time, and on the complaint of Piggott, they would no doubt exercise the power conferred upon them by the last clause in sect. 3 of the statute, by discharging the appellant from his contract. At all events, he could not commit the offence of not entering into service (which is the charge here) more than once.

COCKBURN, C. J.—I am of opinion that this conviction cannot be sustained. The facts are that the appellant, having made a binding contract with one master, pending it made a second with another, and refused to enter into the service stipulated for by the second contract, on the ground that he was bound to fulfil the first. For this refusal he has been convicted. But, as his counsel truly says, the statute does not make it an offence to enter into a contract which cannot be performed. Where the performance is impossible without breach of a penal law, the penalties of the statute do not attach upon the non-performance. A man is liable to the penalties which the statute provides for the omission to enter upon or to continue in an agreed service, only if he so acts without lawful excuse. I think that he has a lawful excuse if he cannot fulfil his contract without incurring a criminal responsibility, although it may well be that such an excuse would furnish no defence to a civil action. Suppose him to have contracted to serve another in some trade prohibited by the Legislature, it is clear to me that he would not be punishable under this statute for not entering into that service. In the present case, the appellant could not have entered into the service, under the second *contract, without committing the statutable offence of absent- [*367 ing himself from the service into which he had already entered under the first. That gave him a lawful excuse sufficient to relieve him from liability to this conviction.

WIGHTMAN, J.—I certainly entertained considerable doubt during part of the argument, because the appellant's case appeared to fall within the very words of sect. 3 of the Act, it being undisputed that

(a) In re Baker, 2 H. & N. 219.†

(b) 7 E. & B. 69 (E. C. L. R. vol. 90).

he did contract to serve the respondents, and that he did not enter into their service according to his contract. It was, however, decided, at an early period after the passing of the Act, that the mere fact of not entering into the service was not, alone, sufficient to cause the penalties thereby provided to attach; but that, further, the omission to enter the service must be without some lawful excuse. And this is but a reasonable construction of the statute; otherwise an incapacity, such as illness, to enter the service, would subject the person incapacitated to the infliction of the penalties; which would be a monstrous injustice. The question, then, is simply, had the present appellant a lawful excuse? I did entertain doubts whether it lay in his mouth to set up his prior contract with Piggott as an excuse for breaking his contract with the respondents. But, on consideration, I think that such a case was hardly contemplated by the statute. The difficulties which might arise, if it was, have been pointed out in the course of the argument. The appellant says to the respondents, in effect, "I cannot enter your service because, if I did, I should be liable to criminal proceedings and imprisonment, at the instance of Piggott." It seems to me that he has placed himself in such a situation that, although the respondents are not wholly *with-
*368] out remedy against him, he has a lawful, or I would rather say, a sufficient, excuse in answer to their complaint under this statute.

(HILL, J., was absent.)

BLACKBURN, J.—I am of the same opinion. Looking simply at the words of the statute, the appellant's conduct brings him literally within them. Seth Turner's case, 9 Q. B. 80 (E. C. L. R. vol. 58), however, establishes that he is not liable to conviction unless he has acted without lawful excuse; nor, according to our recent decision in *Rider v. Wood*, ante, p. 338, can he be held responsible unless he had a guilty knowledge that he had no lawful excuse. It appears that, before contracting with the respondents, he had bound himself by agreement to serve another master and had entered into that service. He could not, therefore, serve the respondents without becoming criminally liable to his first master for absenting himself from service. I think that that gave him a sufficient excuse for refusing to enter the respondents' service. Had the statute imposed a punishment upon the entering into a contract which could not be performed, it would have been a proper question whether the appellant had committed that offence. I am far from saying that it would not have been wise in the Legislature to have created such an offence. It may be that the objects sought to be attained by the Act have not been fully attained in consequence of their omission to do so. We, however, can only construe the Act as it stands; and, so construing it, it does not warrant this conviction.

Judgment for the appellant.

***BOULTON v. REYNOLDS.** *Nov. 22.*

[*369]

A man merely left in possession of a distress by the person who distrained, has no implied authority in law to receive from the tenant payment of the rent distrained for.

W., a broker, in pursuance of a warrant delivered to him by defendant, the landlord, distrained for rent upon goods of plaintiff, the tenant, on the demised premises, and left R. in possession. Plaintiff, knowing that R. was not, and that W. was, authorized in fact by defendant to receive the rent, and that W. was within a reasonable and convenient distance of the premises, tendered the rent to R., who refused to receive it, but offered to send for W., which offer plaintiff rejected.

Held, that the tender to R. was not good as against the defendant.

THE first count of the declaration was for taking on premises of which defendant was landlord, and one Chittenden tenant, as a distress for rent in arrear, goods of plaintiff which were of greater value than the rent in arrear.

Second count: For wrongfully keeping and converting the goods seized, after tender by plaintiff (after seizure, but before impounding) of the amount of rent due and costs.

The declaration also contained counts for selling the goods for less than the best obtainable price, and for a wrongful conversion of the goods.

Plea. Not guilty. Issue thereon.

At the trial, before Blackburn J., at the Sittings in London after last Trinity Term, it appeared that the defendant was owner of a house at Woodford Green, Essex, one Chittenden being his tenant, and the plaintiff occupying part as an undertenant. One quarter's rent (7*l.* 10*s.*) being in arrear, in December, 1858, the defendant delivered to a broker, named Waller, a warrant in the usual form and addressed to him, under which Waller distrained for the rent, and seized certain furniture and other goods of the plaintiff on the premises. Waller left a man named Raggles in possession. While the goods were still on the premises, the plaintiff called at the defendant's house in *order to endeavour to settle the matter, but he was informed by the defendant, through a servant, that the defend- [*370] ant had left the matter entirely in the hands of his broker. The next day, before the goods were removed for sale, and while Raggles was in possession, the plaintiff, Chittenden being present, tendered Raggles the amount of the rent in arrear and costs; Raggles refused to receive it, and informed them he was only left to keep possession, and was not authorized to receive any money, but that Waller was close by (400 yards off), and offered to send for him; this offer the plaintiff refused. The goods were afterwards removed and sold. The jury found the value of the goods seized and sold to be 15*l.*, and found a verdict for the plaintiff for 5*l.* on the first count. And, in answer to questions by the learned Judge, they found that Raggles was not authorized in fact to receive the rent; that Waller was authorized, and was within a reasonable and convenient distance of the premises, and that the plaintiff knew all these facts.

On this finding, the learned Judge directed a verdict to be entered on the second count for the defendant, reserving leave to the plaintiff to move to enter it for him on that count, and to increase the damages to 15*l.*, or by 1*s.*, if the Court should be of opinion that, as matter of

law, the man in possession has authority from the landlord to receive the rent and costs.

Collier, in this Term, obtained a rule, in pursuance of the leave reserved, on the ground that the rent was duly tendered.

Pigott, Serjt. now showed cause.—The question is, whether the *371] tender to the man in possession was a good *tender. The finding of the jury that this man, Raggles, was not authorized in fact to receive the rent is conclusive against the validity of the tender of it to him, unless he had, as matter of law, authority to receive it. [HILL, J.—In Lord Chief Baron Gilbert's Law and Practice of Distress and Replevin (4th ed. by Impey), pages 82 and 83, the law is stated as follows: "It is to be observed, that the tender of amends must be pleaded to the lord himself, and not to the bailiff, who makes conusance of the cause of the caption and detention in right of the lord; for that right is not barred by a tender to any other than the lord himself. But if a tender be pleaded to the lord, and they give in evidence a tender to the lord's bailiff, where the lord was present, that will not maintain the plea; because the derivative power of the bailiff ceases where the lord is present; and they ought to prove the tender to that proper person to whom the amends belong, and who was ready to receive it. Yet, if they plead a tender to the lord, and prove a distress taken by a bailiff, the lord not being present, and prove the bailiff to be the usual receiver of the lord; quære if that will not be a proof of a sufficient tender of amends to the lord himself?"] That passage shows that a tender to Waller, the broker, might have been good. Admitting, however, that it would have been, the doctrine is not to be extended. The man put into possession by the broker does not stand in the same position as the broker himself. He is a mere instrument to keep possession; the broker puts him in for that purpose only, just as the broker might lock up the goods distrained, in order to their safe keeping. In *Pilkington v. Hastings*, *372] Cro. Eliz. 813, it was held that, *on a distress damage feasant, tender to a servant who did not distrain, but was merely present with his master at the distress, was not good. The principle of that decision is equally applicable to the case of a distress for rent. In *Browne v. Powell*, 4 Bing. 230, 232 (E. C. L. R. vol. 13), Best, C. J., says, "I agree to the position in *Pilkington's Case*, that the servant distraining is not always the person to whom tender of amends can be made; for I may authorize a person to distrain whom I could not trust to receive the amends." In *Woodfall's Landlord and Tenant*, p. 306 (4th ed.), it is laid down that the tender should be made to the lessor himself, and *Smith v. Goodwin*, 4 B. & Ad. 413 (E. C. L. R. vol. 24), s. c. 1 N. & M. 371 (E. C. L. R. vol. 28), is cited in support of that proposition. After the finding of the jury, to hold that Raggles had authority by law to receive the rent would be to make him the defendant's agent against the defendant's will. Supposing, however, that the Court should so hold, the question will arise, what is the measure of damages? [HILL, J.—The judgment in *Branscomb v. Bridges*, 1 B. & C. 145 (E. C. L. R. vol. 8), shows that, after a good tender, trover lies for the wrongful taking of the goods. The measure of damages must therefore be the value of the goods.]

Collier, in support of the rule.—The tender was good. The land-

lord deposes a broker to make the distress, and the broker, after distraining, leaves a man in possession. That man represents the landlord, for the purpose of receiving the rent, and the tenant is warranted in tendering it to him. Pilkington's Case is reported also in Coke, 5 Rep. 76 a. The tender to the servant was there held insufficient on the ground that the master was present at *the [*373 distress. Nor is it immaterial, that that was the case of a [*373 distress damage feasant. The amount to be tendered as amends, in such a case, is unliquidated; and this is an additional reason why a servant should not be empowered to receive the tender; but, in a distress for rent, the amount due is ascertained and certain, and there can be no objection to a servant receiving it. In the report of *Smith v. Goodwin*, in *Nevile and Manning*, the Court, in giving judgment, say, "The tender to Nash" (the man in possession) "was rendered invalid by the refusal to pay unless a receipt were given;" thereby implying that an unqualified tender to him would, in the opinion of the Court, have been good. In *Kirton v. Braithwaite*, 1 M. & W. 310,† it was held that a tender to an attorney's clerk, at the attorney's office, of money, payment of which at that office had been previously demanded by the attorney of the person making the tender, was a good tender to the attorney. So, here, the tender to Raggles, the person who, at the time of tender, represented the defendant on the premises distrained upon, was a good tender to the defendant. In *Gregory v. Cotterell*, 5 E. & B. 571 (E. C. L. R. vol. 85), payment by an execution-debtor, whose goods had been seized under a *fi. fa.*, of the amount of the levy, to an assistant of the sheriff's bailiff at the office of the latter, was held a good payment to the sheriff. [BLACKBURN, J.—That was on the ground that the sheriff has a power of delegating his authority to his officer, and is therefore responsible for everything done by the officer under colour of the authority delegated.]

(COCKBURN, C. J., and WIGHTMAN, J., were absent.)

*HILL, J.—I am of opinion that this rule must be discharged. [*374 The question arises on that part of the declaration which complains of the defendant wrongfully keeping and converting the plaintiff's goods, after a tender by the defendant of the rent and costs. It appears that the defendant, the landlord of premises partly occupied by the plaintiff, authorized by warrant a bailiff named Waller to distrain on the premises for rent in arrear; that Waller distrained and left a man named Raggles in possession, to whom, while so in possession, the plaintiff tendered the amount due for rent and costs. Raggles refused to receive it, stating that he was not authorized to do so, and offering to send for Waller, who was, and was close by; which offer the plaintiff rejected. The jury have found that the facts were, to the knowledge of the plaintiff, as Raggles represented. The question, therefore, simply is, whether Raggles had authority, in point of law, to receive the money on behalf of the defendant, he having none in point of fact. I am of opinion that he had not. If it were necessary to decide whether a bailiff who has been empowered by the landlord to distrain, and has distrained accordingly, has authority, to be implied from his position, to receive a tender, I should say that he has, for there ought to be some one authorized to receive it for the

convenience of the tenant. *Pilkington's Case*, 5 Rep. 76 a, s. c. *nomine Pilkington v. Hastings*, Cro. Eliz. 813, shows that when a bailiff goes with his employer, who himself distrains, the bailiff has not the authority in question; but I think that, if the bailiff conducts the distress without any personal intervention by the landlord, a tender to the bailiff is good. It would, however, be a monstrous *375] proposition to assert that any one *of the bailiff's followers who may chance to be left in possession has the same authority as the bailiff himself. Counsel for the plaintiff relies upon the decision in *Smith v. Goodwin*, 4 B. & Ad. 413 (E. C. L. R. vol. 24), s. c. 1 N. & M. 371 (E. C. L. R. vol. 28), as assuming that the man in possession has authority to receive the rent, if properly tendered. That case, however, merely decided that a tender to the landlord himself which the tenant had also made, was good. The judgment of the Court is very shortly reported, in a collective form, in *Nevile and Manning*, and at the end of it this passage occurs. "The tender to Nash" (the man in possession) "was rendered invalid by the refusal to pay unless a receipt were given." This dictum, even if it be correctly reported, was wholly unnecessary and beside the question. In the judgments, as reported seriatim and more at length in *Barnewall and Adolphus*, no reference whatever is made to the tender to the man in possession. In the absence, therefore, of any decision to the contrary, I think that, as the jury have found as a fact that the man in possession had no express authority from the defendant to receive the money, so neither did the law give him any implied authority.

BLACKBURN, J.—I am of the same opinion. At the trial I was much impressed with the idea that it is the duty of a landlord who distrains to provide some one, within a reasonable distance of the premises, to receive payment of the amount distrained for; and that, if no other representative of the landlord than the man in possession could be found within that reasonable distance, the tenant would be *376] justified in assuming that he *was the person authorized by the landlord to receive the money. Whether that was an accurate impression (and I am disposed to think that it was) is not now the question. Having it in my mind, I put the questions which I did to the jury. They have found that Waller, the bailiff expressly authorized by the defendant to receive the tender, was within a reasonable and convenient distance of the premises, when the plaintiff made the tender to Raggles, who had no such authority; and that the plaintiff knew all the facts. That being so, I know of no reason why the mere broker's man left in possession should be held to have had an authority in law which was withheld from him in fact. Had there been any decision to that effect, I should have felt bound by it; although such a rule of law would be very inconvenient, since, if the law were so, broker's men would have to be taken from a higher class of persons than that from which they are now selected, and would have to be called upon to give security for their duly accounting for the sums which may be paid to them. But the only case cited in support of such a doctrine, *Smith v. Goodwin*, 4 B. & Ad. 413 (E. C. L. R. vol. 24), s. c. 1 N. & M. 371 (E. C. L. R. vol. 28), fails to bear it out; the dictum relied upon, as reported in *Nevile and Manning*, being wholly unnecessary to the decision, and not appearing at all in

the report in *Barnewall and Adolphus*. I am, therefore, clearly of opinion that the tender to *Raggles* was a bad tender; and that the rule must be discharged. Rule discharged.

Generally in the case of a tender to an agent of the creditor the burden is on the debtor to show his authority, which cannot be inferred from the mere relationship of agent and principal. Thus, a tender to a clerk of the sub-agent, is insufficient, unless it is shown that such clerk had authority to receive the money: *Hargons v. Lahens*, 3 Sandf. 213; and where the plaintiff's son was sent to demand a specific amount on an unliquidated claim, an offer to him of a less sum was held (*Chipman v. Bates*, 5 Verm. 143) not to be a legal tender to the father. In *Dunham v. Pettee*, 4 E. D Smith (N. Y. C. P.) 500, an omis-

sion of a clerk to specify an objection (a lien for storage) to a tender of goods was deemed insufficient to constitute a waiver even if authorized to receive the tender, and where an agent is directed not to receive any money, if offered to him, but to refer the debtor to a third person, and this fact is communicated to the debtor, the latter must seek the one designated or his principals: *Hoyt v. Hall*, 3 Bosw. 42.

And so a tender to an executor before he has acted or has qualified to act, and while he is in another state, is insufficient: *Todd v. Parker*, Coxe (N. J.) 45.

*Re NEWPORT BRIDGE. Nov. 22.

[*377]

Stat. 43 G. 3, c. 59, s. 2, enacts "that where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the" "justices" of the county, "at any of their General Quarter Sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public." The section further contains a proviso "that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges."

Held, that the section is permissive, not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and incommodious. Held, further, by Hill and Blackburn, Js., that the making of the presentment mentioned in the proviso is a condition precedent to the obligation of the justices to make an order.

DOWDESWELL moved, on behalf of certain inhabitants of the county of Monmouth, for a rule calling upon the justices of the said county to show cause why a mandamus should not issue to them, commanding them, at their General Quarter Sessions, to order and direct Newport Bridge, being a public county bridge, to be widened, improved, and made commodious for the public.

It appeared from the affidavits, that Newport Bridge, adjoining the town of Newport, was a public county bridge, built about the year 1801; that the population of Newport had increased since that date from 2000 to upwards of 28,000; and that the bridge, from its narrowness and steepness, was extremely incommodious, inconvenient, and insufficient for the traffic. The question of widening and improving the bridge had been discussed by the justices at several Quarter

make an order; and Mr. *Dowdeswell* has not attempted to argue that there has been a presentment.

*382] BLACKBURN, J.—I am entirely of the same opinion, that *the words “it shall and may be lawful” are to be taken in their primary sense as permissive and not compulsory unless there be anything in the subject-matter of the enactment requiring that they should receive a different construction. For a time I thought that the present enactment did require that the imperative construction should prevail, and that the object of the Legislature was that, upon the one fact appearing that the bridge was narrow and incommodious, it should be widened as a matter of course. I now, however, agree in what has fallen from my brother Hill, that the justices have other matters, such as he has pointed out, to take into consideration besides the narrowness of the bridge, before they decide whether or not to order it to be widened. That being the case, it is quite clear that the Legislature must have intended to leave them the discretion which the language of the statute *primâ facie* imports. I also agree with my brother Hill that the concluding proviso in sect. 2 makes a presentment a condition precedent to the obligation of the justices to make an order; and this condition has not been complied with.

Rule refused.

*383] *Ex Parte WILLIAM PERHAM. Nov. 23.

Stat. 6 G. 4, c. 129, s. 3, enacts that “if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work,” “every person so offending,” “being convicted thereof in manner hereinafter mentioned,” shall be imprisoned, with or without hard labour, for not more than three calendar months. The form of conviction given in the Schedule to the Act runs thus: “A. B. is convicted” “of having [*stating the offence*] contrary to the Act,” &c. The Metropolitan Police Act, 2 & 3 Vict. c. 71, s. 48, enacts that “in every conviction for an offence contrary to any statute or statutes, it shall be sufficient if the offence shall be stated in the words of the statute declaring the offence, or attaching any penalty thereunto.”

A conviction under stat. 6 G. 4, c. 129, s. 3, by a Metropolitan Police magistrate, stated that W. P. was convicted “of having” “unlawfully, by threats, endeavoured to force one W. J., who was then and there a workman hired in his trade and business of a mason by T. P., to depart from his said hiring, contrary to the Act,” &c.

Held that, by reason of the enactment in the Metropolitan Police Act above mentioned, this conviction was sufficient, as it stated the offence in the words of stat. 6 G. 4, c. 129, s. 3; although it did not set out the threats which were used, or allege to or against whom they were uttered. And, semble, that the conviction was valid, irrespectively of the provisions of The Metropolitan Police Act.

EDWIN JAMES, yesterday, moved for a rule to show cause why a habeas corpus ad subjiciendum should not issue to the keeper of the Coldbath Fields House of Correction, to bring up the body of William Perham, on the ground that the conviction under which he was detained in custody was invalid on the face of it.

The facts and the argument sufficiently appear in the judgment of the Court.

Cur. adv. vult.

HILL, J., now delivered the judgment of the Court.(a)—This was a motion for a rule to show cause why a habeas corpus should not

(a) Hill and Blackburn, Js.

issue to bring up the body of William Perham, on the ground that he was illegally detained in custody. It appears that Perham was convicted by one of the metropolitan police magistrates, within the *metropolitan police district, of an offence against sect. 3 of [*384 stat. 6 G. 4, c. 129. It was alleged on his behalf that the conviction was insufficient. The section in question enacts as follows. "If any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment or work," "every person so offending" "being convicted thereof in manner hereinafter mentioned, (a) shall be imprisoned only, or shall and may be imprisoned and kept to hard labour, for any time not exceeding three calendar months." And the following is the language of the conviction. "Be it remembered, that on," &c., "William Perham was convicted before me," "one of the magistrates of the police courts of the metropolis sitting at Clerkenwell Police Court, in the county of Middlesex, of having (on the first day of October, A. D. 1859, and within the space of six calendar months before the complaint on oath on which this conviction is founded was made, in the parish of St. Luke in the said county), unlawfully, by threats, endeavoured to force one William Jocelyn, who was then and there a workman hired in his trade and business of a mason by Thomas Piper and Wilson Piper, to depart from his said hiring, contrary to the Act," &c., and was adjudged to two months' imprisonment in the Coldbath Fields House of Correction.

It was contended that, although the conviction *followed the language of the statute upon which it is founded, yet that it [*385 was insufficient, as it did not set out the threats which were used, nor did it allege to or against whom the threats were uttered; and we were referred to Paley on Convictions, p. 173 (4th ed.), (b) Seth Turner's Case, 9 Q. B. 80 (E. C. L. R. vol. 58), and Geswood's Case, 2 E. & B. 952 (E. C. L. R. vol. 75). The attention of the Court was also directed to the Metropolitan Police Act, as relied on by those who supported the conviction. By that statute, 2 & 3 Vict. c. 71, s. 48, it is enacted that, "in every conviction for an offence contrary to any statute or statutes, it shall be sufficient if the offence shall be stated in the words of the statute declaring the offence or attaching any penalty thereunto." In our judgment this enactment is a complete answer to the application. The conviction complained of is one made by one of the magistrates of the police courts of the metropolis within the metropolitan police district; and in the conviction the offence is stated in the words of the statute creating the offence. The Act of Parliament declares that to be sufficient, and concludes the question; therefore on that ground there can be no rule. If it were

(a) By sect. 9 the conviction is to be drawn up in the form set forth in the Schedule. The form is: "Be it remembered, that on," &c., "A. B. is convicted before us [naming the justices]" "of having [stating the offence] contrary to the Act made," &c.

(b) The passage cited from Paley is as follows. "Although, generally speaking, it is sufficient to follow the words of the statute upon which the conviction is founded, yet it is sometimes necessary, in pursuance of the intent of a statute, to adopt a narrower description than what is conveyed in the literal terms of the Act."

necessary to give an opinion on the validity of the conviction in point of form, irrespective of the provisions of The Metropolitan Police Act, we should be disposed to hold it valid. Generally speaking, it is sufficient in conviction to follow the words of the statute on which the conviction *386] is founded; but that will not be enough *where the statute is so worded as by its language to include acts manifestly not within its intent. The cases cited to us are apt illustrations of the exception referred to. It appears to us that the language of the statute in the present case is such as to bring it within the rule and not within the exception. Rule refused.

The QUEEN v. The Justices of SALOP. Nov. 25.

Stat. 53 G. 3, c. 127, s. 7, after empowering churchwardens to summons before justices persons refusing to pay a church-rate, provides that "if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon."

Held that, in order to oust the jurisdiction of justices under this section, notice that the validity of the rate is disputed must be given to them in a manner such as to induce them to forbear giving judgment.

At the hearing of a summons before the justices, the attorney who attended for the person summonsed took no objection to the jurisdiction of the justices, but, after cross-examining the witnesses called by the churchwardens, submitted objections to the validity of the rate to the decision of the justices. The justices having overruled the objections, he then, but not before, gave them notice that he *bonâ fide* disputed the validity of the rate. The justices, however, made an order upon the person summonsed to pay the rate.

Upon these facts this Court, in the exercise of its discretion, discharged with costs a rule for a certiorari to bring up and quash this order.

WILLS had obtained a rule, calling upon Charles Wickstead and George Pardoe, Esqrs., two of the justices for the county of Salop, to show cause why a writ of certiorari should not issue to remove into this Court a certain order under their hands and seals, whereby Sir E. Blount was ordered to pay to John Boucher, one of the churchwardens of Cleoburey Mortimer, the sum of 6*l.* 14*s.* 10*d.*, as and for arrears of church-rate for the said parish, together with costs.

It appeared, from the affidavits on which the rule was obtained, that the churchwardens of the said parish had made complaint that the said Sir E. Blount had refused, and still did refuse, to pay the *387] said sum of 6*l.* 14*s.* 10*d.*, *being the sum which, as alleged by the churchwardens, was duly rated and assessed upon him. That, upon the hearing of the summons issued upon the above information, Sir E. Blount attended before the justices with his attorney. The churchwardens proved that notice was given of a vestry being held for certain purposes: first, for the election of churchwardens; secondly, for the auditing of the churchwardens' accounts; thirdly, for the levying a rate to meet the expenses of the coming year; and they further proved that the said notice was affixed to the door of the parish church. Sir E. Blount's attorney took two objections to the validity of the said rate. [These objections are here omitted, they being immaterial to the question discussed and decided upon the argument of the rule.] The justices overruled them, and the said attorney then gave notice that he *bonâ fide* disputed the validity of

the said rate, and stated that amongst the grounds on which he relied were the two objections which he had previously taken. The justices, nevertheless, made an order upon the said Sir E. Blount to pay the said sum at which he was assessed, together with costs.

From the affidavits which were used in showing cause against the rule it appeared that no objection was made to the validity of the rate, or the liability of Sir E. Blount to pay the same, nor was any notice given to the said justices that the rate was objected to, before they had entered upon the hearing of the said summons, but that the case was called on, the evidence taken, and the witnesses in support of the summons cross-examined by the attorney for Sir E. Blount in the usual manner. That at the close of the evidence in support of the summons the said attorney, *instead of taking any objection to the jurisdiction of the justices, made certain objections, [*388 and such objections having been answered by the attorney for the churchwardens, both the said attorneys awaited the decision of the said justices thereon. The said justices overruled them and, the said attorney for Sir E. Blount not making any other objection, nor calling any witnesses, gave their judgment against the said Sir E. Blount. The said John Boucher, in his affidavit, amongst other things, swore as follows. "The case, on the part of the churchwardens, being thus completed, the said attorney rose, and, addressing the said justices, said, as nearly as I can recollect, as follows: 'I admit that a demand was made of the rate upon Sir E. Blount, and that there was a refusal to pay, and I also admit that there is no dispute as to the amount of the rate, but I shall contend that upon two points Sir E. Blount will be entitled to the decision of the Bench in his favour.'" [The two objections taken to the validity of the rates were then set out.] "And the said attorney then proceeded to argue and enlarge upon the said two objections before the said justices, and on behalf of the said Sir E. Blount distinctly and expressly submitted the same to them for their decision. The said attorney for the churchwardens then replied to the objections raised by the attorney for the said Sir E. Blount, and the said two justices then conferred, and overruled the said objections."

Bovill and *J. J. Powell* now showed cause against the rule.—The question is, whether the jurisdiction of the justices was ousted by the course taken by Sir E. Blount's attorney at the hearing of the information. The other side will contend that it was, by reason of stat. 53 G. 3, *c. 127, s. 7; by the third proviso in which it is enacted that, "if the validity of such rate, or the liability of [*389 the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon." But this enactment only applies where the person summonsed before the justices takes the objection to their jurisdiction, on the ground that he disputes the validity of the rate, before the case is gone into. Here, Sir E. Blount's attorney, so far from doing this, distinctly and expressly submitted his objections to the rate to the decision of the justices, and cross-examined the witnesses called in support of the summons. It was not till the justices had overruled the objections that he sought

to make them hold their hands; and it was too late for him then to seek to avail himself of the statute. (They were then stopped.)

Wills, in support of the rule.—As soon as the justices had notice that Sir E. Blount disputed the validity of the rate, their jurisdiction to decide the case ceased. It is not suggested by the other side that there was any *mala fides* on the part of Sir E. Blount. The statute does not say that the notice that the validity of the rate is disputed must be given to the justices at any particular stage of the proceedings; nor does it require an objection to be taken in terms to the jurisdiction of the justices. [CROMPTON, J.—Do you say that, after the parties have agreed to ask the justices to decide the matter, we are bound to grant this discretionary writ of certiorari?] If the Court refuses to grant the writ, it will uphold the justices in the exercise of an usurped jurisdiction. In the judgment of the Court in *390] *Ricketts v. Bodenham*, 4 A. & E. 433, 443 (E. C. L. R. vol. 31), it is said that the effect of the proviso in the statute “is that” “the moment it appears that the question is one not merely of *enforcing payment*, but touching the *validity* of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches.” [*Bovill*, contra, referred to *Regina v. South Holland Drainage Committee Men*, 8 A. & E. 429 (E. C. L. R. vol. 35), as showing that on application for a certiorari the Court will take into consideration the conduct of the party applying. [CROMPTON, J.—I have always acted on that principle.] There has been nothing in the conduct of Sir E. Blount or his attorney, to disentitle Sir E. Blount to the issue of the writ.

(COCKBURN, C. J., was absent.)

CROMPTON, J.—I think that the effect of the facts, as they appear on these affidavits, is, that the parties came before the justices, invited them to decide the matter, and did not in any way decline their jurisdiction. The justices having given their decision, it is too much to come and ask us to issue the discretionary writ of certiorari. It is said that *mala fides* is not imputed to the applicant. I think that he has acted against good faith to this extent, that he has first asked the justices to decide the case, taking the chance of their decision being in his favour, and then sought, by the present application, to get rid of their decision, it having proved to be unfavourable. I think that it was the intention of the statute that the person disputing the validity of the rate should at once give notice to that effect to the justices, not *391] that he should first lead the justices to decide the question, and then dispute their jurisdiction to decide it. I think, therefore, that the rule should be discharged, with costs.

HILL, J.—I am of the same opinion. If a party comes to this Court and asks for a certiorari to bring up an order, that it may be quashed, he is bound to satisfy us that he has done nothing to preclude him from the relief which he seeks. But when it appears that the applicant submitted the whole matter to the decision of the justices, argued it before them, invited them to decide it, and made no objection to their jurisdiction till they had decided against him, he cannot afterwards be heard to say that the order was made without jurisdiction. The affidavits are not so clear as they should be, but I

gather from them that the facts are as I have stated. The rule must therefore be discharged, with costs.

BLACKBURN, J.—I am of the same opinion. The party who wishes to oust the jurisdiction of the justices should give them notice that he disputes the validity of the rate in a manner to induce them to forbear giving judgment on the case. Here the dispute as to the validity of the rate was only raised before the justices for the purpose of obtaining their opinion upon it.

Rule discharged, with costs.

Ex parte SIMPKIN. Nov. 25.

[*392

By the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, s. 40, appeals to the Quarter Sessions against orders made under the Act are not to be heard, unless the appellant, within fourteen days after the making of the order appealed against, gives written notice of appeal and written grounds of appeal, and, within two days of giving such notice, enters into a recognisance before a justice, with sufficient securities, conditioned to try the appeal.

Held, that Sunday is not to be excluded from the computation of the two days within which the appellant is to enter into the recognisance, although Sunday happens to be the last of them; that, therefore, in a case where an appellant had given notice of appeal on a Friday and did not enter into the recognisance till the following Monday, the Sessions were right in refusing to hear the appeal.

MEREWETHER moved for a rule calling upon the Local Board of Health of Thurmaston, in the County of Leicester, and the justices of the said county, to show cause why a mandamus should not issue, ordering the said justices to enter continuances and hear an appeal against an order made by two justices, by which William Simpkin was ordered to fill up a certain cess-pool, so that the same might be no longer a nuisance or injurious to health.

It appeared from the affidavits in support of the motion that the said William Simpkin had been served with a notice, under The Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, purporting to be signed by five of the members of the Local Board, requiring him to do certain acts. He failed to comply with the notice, and a summons was issued, in obedience to which he appeared before the justices in Petty Sessions on 13th August, 1859. A verbal order was then made, by which he was ordered to fill up the cess-pool, and also to pay the costs. He thereupon stated his intention to appeal against the decision of the justices. On 24th August, 1859, he was served with a written order, which bore date 13th August, and purported to be signed by two justices on that day. *On Friday, 26th August, notice of appeal against the said order was served [*393 upon the proper local authority. In the afternoon of Saturday, 27th August, William Simpkin, having provided the necessary sureties, applied at the public offices at Leicester, being the place where the justices of the county sit for the transaction of business, to know whether there were any justices present before whom the necessary recognisance could be entered into. He was informed that no justices were present, and that their clerk had also gone away. The recognisance was entered into on Monday, 29th August, and the appeal came on to be tried at the Quarter Sessions for the said county of Leicester,

held on 18th October, when it was objected that a recognisance ought to have been entered into on 27th August, and that, as that had not been done, the appellant could not be heard. The Sessions, being of opinion that the objection was fatal, refused to hear the appeal.

Mereweather, for his rule.—The Sessions were wrong in refusing to hear the appeal. The question depends upon the construction to be given to The Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, s. 40, which provides for appeals to the Quarter Sessions against orders made under the Act, and enacts that “the appellant shall not be heard in support of the appeal unless, within fourteen days after the making of the order appealed against, he give to the local authority notice in writing stating his intention to bring such appeal, together with a statement in writing of the grounds of appeal, and shall, within two days of giving such notice, enter into a recognisance before some *394] justice of the peace, with sufficient securities, *conditioned to try such appeal at the said Court, and to abide the order of, and pay such costs as shall be awarded by the justices at such Court or any adjournment thereof.” Here, the notice of appeal was given in time, and the only question is whether the required recognisance was entered into within two days of giving the notice; in other words, whether Sunday is or is not to count as one of the two days. It is contended that Sunday ought not to count. It appears from the affidavits that the appellant had to attend at public offices to perform the act of entering into the recognisance. The statute gave him only two days in which to do this, and it is but reasonable to suppose that two days must be meant on either of which it would be in his power to do it. In *Morris v. Barrett*, 7 C. B. N. S. 139 (E. C. L. R. vol. 97), a Judge’s order had been made for payment by a defendant of the debt and costs by instalments, on the 25th of every month, with liberty to the plaintiff, on default being made in any payment, to sign judgment and issue execution for the amount remaining unpaid. The day for payment of the fourth instalment having fallen on a Sunday, the Court held that the defendant had the whole of Monday to pay it in, and made absolute a rule to set aside the judgment which the plaintiff signed, after refusing a tender of the instalment made by the defendant on the Monday. [HILL, J.—*Rex v. Justices of Middlesex*, 2 D. N. S. 719, is expressly in point; where it was held, on the construction of stat. 6 G. 4, c. 95, s. 87, which requires notice of appeal to be served within six days after the cause of complaint shall arise, *395] that when the last of the six days was a *Sunday, notice on the Monday following was too late.] That case is distinguishable from the present, for there the act to be done was completely in the power of the party who was to do it; here, it was not in the appellant’s power to open the offices at which he was to enter into the recognisance. [BLACKBURN, J.—*Morris v. Barrett* turned upon the meaning of the Judge’s order; the ratio decidendi was not that the act to be done could not have been done upon the Sunday.] It is not reasonable that Sunday should count against a person who cannot possibly do the required act on that day. *Peacock v. Regina*, 4 C. B. N. S. 264 (E. C. L. R. vol. 93), and *Rowberry v. Morgan*, 9 Exch. 730,† are distinguishable on the same ground. The appellant tried every means in his power to enter into the recognisance on the Saturday,

and ought not to be made to suffer for the absence of a justice from the public offices on that day, for which he was not to blame.

(COCKBURN, C. J., was absent.)

CROMPTON, J.—I am of opinion that there should be no rule. The general construction to be put upon enactments of this description is to be collected from *Peacock v. Regina*, namely, that where the statute fixes a given number of days within which an act is to be done, and says nothing about excluding Sunday, Sunday is to be included, although it may be the last day. It has been urged that there will be hardship upon the appellant if we adopt this construction. Had he been without any option of appealing earlier than he did, there might have *been some show of reason in that argument. But [*396 he might have appealed at once, as soon as the order was made: the right of appeal accruing upon the making, not upon the service of the order. There is no necessity to wait for the service before appealing, for the person against whom the order is made knows what it is, quite well enough to enable him to give notice of appeal before the order is formally drawn up. The appellant had fourteen days from the making of the order in which to give notice of appeal, and the statute required him to enter into the necessary recognisance within two days of giving the notice. It was from the doing of his own act that the two days were to run. There is nothing to distinguish the present case from *Peacock v. Regina*. The appellant, after having, by his own act, made Sunday the last of the two days for entering into the recognisance, cannot be heard to say that it was a hardship upon him that that was a day upon which no recognizance could be entered into.

HILL, J.—I am of the same opinion, upon the same grounds; namely, that where an Act of Parliament gives a specified number of days for doing a particular act, and says nothing about Sunday, the days are consecutive days, including Sunday. This was the principle acted upon in *Peacock v. Regina* and *Rowberry v. Morgan*, and I see no reason for differing from it. In the enactment before us, two periods are fixed, one of fourteen, the other of two days. Nothing is said about Sunday; therefore Sunday is to be reckoned in both periods.

*BLACKBURN, J.—I am of the same opinion. I see no [*397 reason to differ from the principle laid down by the Court of Exchequer in *Rowberry v. Morgan*, that we must adhere to the plain meaning of the Act in every case, and hold that Sunday is to be included in the computation of the number of days, if nothing is said about its exclusion. Rule refused.

MEMORANDUM.

In Michaelmas Term, Peter Burke, Esq., of the Inner Temple, was raised to the degree of the coif, and gave rings with the motto "Veritas et judicium."

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN

Michaelmas Vacation,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1859

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

GEORGE ALDHAM and HENRY BARDSLEY v. JOHN BROWN.
Nov. 26.

Declaration on a covenant by defendant, as a subscriber to a projected railway Company, with plaintiffs, the trustees named in the deed, to pay them the amount of defendant's subscription, in such sums as should be required by the provisional directors. The declaration set out certain clauses in the deed, which was the ordinary subscription contract required by the standing orders of Parliament, the Company having applied to Parliament for an Act. One of these clauses gave a discretion to the provisional directors to abandon the application to Parliament. Averment, that the provisional directors had required from defendant payment of part of his subscription. Breach, non-payment thereof.

Plea 2, on equitable grounds: that the sum sued for was in respect of a deposit to be paid on shares in the intended Company, and that, before any claim upon defendant for payment, and before suit, the scheme was wholly abandoned by the provisional directors. Plea 4: that the Company was not provisionally or completely registered at the time of suit, and that plaintiffs brought the action as trustees for the Company, to enforce payment by defendant of a deposit on shares in the capital of the Company. Plea 5: that the Company was never completely registered, and that plaintiffs brought the action as trustees for the Company, to enforce payment by defendant of a call, in respect of the sum subscribed by him, upon shares in the capital of the Company.

Demurrers, and joinders in demurrer.

On appeal to the Exchequer Chamber from the judgment of the Court of Queen's Bench, holding all the pleas to be bad: held, by the majority of the Court (Pollock, C. B., Willes, J., Martin, Watson, and Channell, Bs.), affirming that judgment, that all the pleas were bad. The 2d plea, because it did not allege that the sum sued for was sought to be recovered for any other purpose than to pay preliminary expenses incurred before the abandonment of the scheme; whereas it was the object of the Parliamentary subscription contract to provide for the payment of such expenses, and that object was not rendered illegal by stat. 7 & 8 Vict. c. 110. The 4th plea, because the sum sued for was not a deposit the recovery of which was

prohibited by stat. 7 & 8 Vict. c. 110, s. 23; and because it was consistent with the plea that the Company was provisionally registered when the defendant was called upon to pay, and it was immaterial, if so, whether or not the provisional registration had subsequently expired. The 5th plea, because it did not show that the sum sued for was a call of the character forbidden by stat. 7 & 8 Vict. c. 110, s. 23, or was other than an instalment due from defendant towards the preliminary expenses, under the subscription contract.

Held, by Cockburn, C. J.,^(a) and Crowder, J., while agreeing with the majority of the Court as to the 2d and 4th pleas, that the 5th plea was good, and that the judgment of the Court of Queen's Bench ought to be reversed as to that plea; the plea alleging, and the demurrer admitting, that the sum sued for was a call, and calls being prohibited generally by stat. 7 & 8 Vict. c. 110, s. 23.

THIS was an appeal against the decision of the Court of Queen's Bench^(b) giving judgment for the *plaintiffs upon demurrers [*399 to the defendant's 2d, 4th, and 5th pleas.

The pleadings will be found more fully set out in the report of the case in the Court below. The following abstract of them is taken from the judgment of the majority of the Judges in this Court, delivered by Martin, B.

The declaration stated that by an indenture between the defendant and the several other persons who executed the deed, of the first part, and the plaintiffs, being trustees for the purpose of enforcing the covenants therein, of the second part, the defendant and the other parties thereto of the first part did separately covenant, for himself, &c., that each of them had subscribed and did thereby subscribe the sum set opposite to his name in the schedule, for the purpose of establishing a Company to be called The Swansea Docks and Mineral Valleys Railway Company, for enabling the Company to make the said railway, and other proper and suitable works connected therewith; and the parties thereto of the first part did thereby authorize and empower the provisional directors or committee of management for the time being to abandon or defer, if they thought fit, the application to *Parliament in respect of all or any part of the said [*400 proposed undertaking, and to make and enter into such contracts with land proprietors, &c., for any purposes connected with or affecting the said undertaking, and generally to do and perform all such acts, &c., as they might deem necessary for the attainment of the said objects, or any of them. And the defendant did thereby covenant with the plaintiffs that he would pay the full amount subscribed by him, or such part thereof as should not have been paid at the time of the execution of the indenture, in such sums, &c., as should from time to time be required by the provisional directors or committee of management, until the passing of the Act to be obtained as aforesaid, and after the passing thereof as should be required or directed by the said Act; it being the express meaning and intention of each of the said parties of the first part that the amount subscribed by him should be recoverable from him by the parties thereto of the second part by action at law, in case default should be made in payment thereof. Averments: That the sum set opposite the defendant's name in the schedule, and subscribed by him, was 400*l.*; that after the making the indenture, and before the passing of the Act, the provisional directors required the defendant to pay 50*l.*, parcel of the

(a) See note (a) at p. 410.

(b) Aldham v. Brown, 7 E. & B. 164 (E. C. L. R. vol. 90).

400l., on a day which had elapsed before the commencement of the suit. Breach; that the defendant had not paid the said sum of 50l.

The defendant pleaded, secondly, for defence on equitable grounds: That the Company was one provisionally registered, under stat. 7 & 8 Vict. c. 110, and the indenture was the subscribers' contract, made in pursuance of the standing orders of the Houses of Parliament, for the purpose of obtaining an Act to carry out the purposes and *401] *objects in the declaration mentioned, and which could not be carried out without the authority of Parliament; that the 50l. sought to be recovered was claimed to be due in respect of a deposit to be paid on shares in the said projected undertaking; that before the payment of the said deposit was claimed, the said undertaking and every part thereof, and the intention to apply for the said Act of Parliament, was wholly abandoned as abortive by the provisional directors and promoters of the said undertaking; and that the action was brought by the plaintiffs as trustees of and for the sole benefit of the said Company and of the provisional directors.

The defendant pleaded, fourthly: That the Company was one within the meaning of the said Act, and the purposes thereof could not be carried into execution without the authority of Parliament; that at the time of the commencement of the suit, the Company was not provisionally or completely registered; that the action was brought by the plaintiffs as trustees of and for the sole benefit of the Company and the directors, and in order to enforce payment of a deposit on shares in the capital of the said Company subscribed for by the defendant, contrary to the statute.

The defendant pleaded, fifthly: That the Company was one within the meaning of the said statute, as alleged in the previous plea, and had never obtained a certificate of complete registration; that the indenture was the subscription contract, entered into in pursuance of the standing orders of Parliament, as aforesaid; that the action was brought by the plaintiffs as trustees of and for the sole benefit of the Company and the provisional directors, and for the purposes of enforcing the payment of a call in respect of the sum subscribed *402] by the defendant, namely *a call of 2l. 10s. per share on each share of 20l. in the capital of the Company, contrary to the statute.

To these pleas the plaintiffs demurred.

The Court of Queen's Bench gave judgment for the plaintiffs (7 E. & B. 164 (E. C. L. R. vol. 90)), and the defendant appealed to this Court against their decision.

The case was argued, in Hilary Vacation, 1858, by

Hugh Hi'l, for the defendant, in support of the appeal.(a)—It is not now intended, on behalf of the defendant, to rely upon the 2d and 4th pleas. The fifth plea, however, is good. Stat. 7 & 8 Vict. c. 110, s. 23, prohibits a Company, while only provisionally registered, from making calls, and from demanding from the subscribers any sum beyond a deposit of 10s. per 100l., and, in the case of Companies which cannot be carried into execution without the authority of Parliament,

(a) Tuesday, February 2d. Before Cockburn, C. J., Pollock, C. B., Crowder and Willes, J., Martin, Watson, and Channell, B. Cockburn, C. J., was then Chief Justice of the Court of Common Pleas.

such further sum per 100% on the amount of every share as may be required by the standing orders of Parliament to be deposited before the Company can obtain its Act. And sect. 25 mentions the receipt of calls, that is, of instalments from subscribers in respect of the amount of any shares not paid up, as amongst the things which may be done by a Company after complete registration. The two sections, taken together, clearly show that calls cannot be made or enforced before the complete registration of the Company. Railway Companies which, like the present, require an Act of Parliament, must be provisionally registered under the statute: *Abbott v. *Rogers*, [403 18 C. B. 277 (E. C. L. R. vol. 81); and, when so registered, they are in all respects under the same disqualifications as any other provisionally registered Companies. Moreover, by the express words of sect. 25, a railway Company "which cannot be carried into execution without obtaining the authority of Parliament" cannot, even on complete registration, before obtaining its Act, "exercise the power to receive instalments from shareholders beyond the sum or percentage necessary to be deposited in compliance with the standing orders of either House of Parliament, or such other sum as may be requisite for obtaining the Act of incorporation or other Act for granting the authority of Parliament to execute" the railway. Still less, therefore, can such a Company, while merely provisionally registered, exercise such a power. The Court below were wrong in holding that sect. 25 does not apply to Companies which have a subscription contract, and the complete registration of which is provided for by sect. 9; there is nothing in the language of sect. 25 to give it that restricted operation, and the only effect of sect. 9 is that it enables certain Companies to entitle themselves to complete registration, without entering into the deed of settlement required by sect. 7. The Court were equally wrong in assuming that the prohibition against making calls, in sect. 23, was intended to protect allottees against calls, and not to discharge those who have executed a subscription contract, binding them to pay preliminary expenses. No mention of allottees is made in that section, nor are they in any way distinct from subscribers. Nor, indeed, was the remark of Crompton, J., in the Court below, in the course *of the argument for the plaintiffs, that "the very [404 object of requiring a subscription contract is to have security for the payment of preliminary expenses," (7 E. & B. 169 (E. C. L. R. vol. 90),) warranted by the language of the contract declared upon, which contains no reference, direct or indirect, to preliminary expenses, as such, but binds the subscribers to defray the expenses of the whole undertaking; not merely those incurred in establishing the Company, but also those involved in making the railway. The allegation in the fifth plea, that the action is brought on behalf of the Company, to enforce a call made upon the defendant in respect of shares, must, on this record, be taken to be true. By reason of the prohibition in the statute, upon the Company, against making such calls, no such action can be maintained.

Lush, contra.—The fifth plea is bad. It is consistent with the plea that the plaintiffs require the money claimed of the defendant for the lawful purpose of defraying the preliminary expenses. By signing the subscription contract, the defendant bound himself to contribute

his quota towards those expenses. The subscription contract is required by the standing orders of Parliament, as a guarantee that those expenses shall be paid, and those who sign it do not thereby become shareholders or allottees of shares. It is true that stat. 7 & 8 Vict. c. 110, prohibits the making of calls upon shares, by a Company, until the Company is completely registered. This action, however, is not brought to enforce such a call. The fifth plea does not allege that the call is a call irrespective of the subscription contract. On *405] the contrary, it alleges the call to be one "in respect of the sum subscribed by the defendant." In other words, what is claimed from the defendant is the subscription which he has covenanted to pay to the plaintiffs as trustees for the Company. There is nothing illegal in such a covenant, and it is but reasonable that the expenses attending the attempt to form the Company should fall upon those who have agreed to bear them. The form of a declaration in an action for calls under stat. 7 & 8 Vict. c. 110, is given in sect. 55: and shows that such an action is totally distinct from the present. It is clear, upon the pleadings, that the claim sought to be enforced in the present action is not a call within the meaning of the prohibitory sections in the statute.

At the conclusion of *Lush's* argument, the further hearing of the case was adjourned.

In Michaelmas Vacation, 1858, (a) *Quain* was heard in reply. His argument was, in substance, the same as that of *Hugh Hill*. (b)

Cur. adv. vult.

The Judges not being unanimous, the following judgments were now delivered.

MARTIN, B., read the judgment of POLLOCK, C. B., WILLES, J., MARTIN, WATSON, and CHANNELL, Bs. The judgment commenced with the statement of the pleadings above set out, and then proceeded.

The case has been argued before us, and we are of opinion that the *406] judgment ought to be affirmed. The action is brought to recover a sum of money which the defendant has covenanted to pay. The legal defence is, that, by virtue of the 23d section of stat. 7 & 8 Vict. c. 110, it is unlawful to demand or sue for it. It will be convenient, in the first instance, to deal with the fourth and fifth pleas, which set up the legal defence. The fourth plea is clearly bad; it, in substance, alleges that the sum claimed is a deposit within the meaning of the 23d section: it certainly is not anything of the kind. The deposit forbidden by the section, beyond the specified amount, is a deposit by way of earnest in present payment; a covenant to pay a sum of money in futuro is a matter quite different. We think, also, that the plea is bad, for the reason stated by Wightman, J., during the argument of Mr. *Quain* in the Court below. The fifth plea is also bad. It alleges that the indenture declared on was the subscription contract entered into in pursuance of the standing orders of Parliament. We think the call forbidden to be made by the 23d section is a call made by promoters or directors of Companies other than provided for by the 9th section, and that the plea is bad for not

(a) Saturday, November 27th.

(b) *Hugh Hill* had been appointed one of the Judges of the Court of Queen's Bench, in Trinity Term, 1858.

showing that the call was one of the forbidden character. We also concur with the observation of Crompton, J., in the Court below that the very object of a subscription contract is to be security for the payment of the preliminary expenses. As to the second plea, the equitable one, it, we presume, is founded upon the supposition that the claim is a legal one, and that there is no defence at law; but it is not alleged that the sum sought to be recovered is for any other purpose than to defray the preliminary expenses: and in our opinion, so far from a contribution by the shareholders for such a purpose being inequitable, it is highly just and reasonable *that parties who subscribe to railway Companies (no doubt in the expectation [*407 of their turning out profitable) should contribute to the preliminary expenses in the event of their failure.

CROWDER, J.—I agree with the rest of the Court in their judgment on the 2d and 4th pleas. But the main argument in this case turned upon the demurrer to the 5th plea. And the question to be decided is, whether that plea is an answer to the action. It appears from the declaration and the 5th plea, taken together, that the defendant had executed a subscription contract deed, under the provisions of stat. 7 & 8 Vict. c. 110, s. 9, with a view to the establishment of a railway Company; and by that deed had covenanted with the plaintiffs, the trustees appointed to give effect to the covenant, that he would pay the full amount subscribed by him, or such part thereof as had not been paid by him at the time of the execution of the deed, “in such sums, and at such place or places, and at such time or times as should from time to time be required or appointed by the provisional directors or the committee of management, until the passing of the Act which was to be obtained, and afterwards as should be required by the Act, or as the directors or others authorized by the Act should direct or appoint.” That the sum opposite the defendant’s name was 400*l.*, and that the provisional directors required him to pay 50*l.*, part thereof; that is, 2*l.* 10*s.* upon each of the twenty shares held by the defendant of 20*l.* each. That the Company in which the defendant held these shares was provisionally registered under stat. 7 & 8 Vict. c. 110, but had never been completely registered. That the plaintiffs sued as *trustees, for the sole benefit of the Company, and that the [*408 action was brought by them to enforce the payment of a call of 2*l.* 10*s.* per share in respect of the defendant’s subscription. This state of facts appearing upon the record, the defendant says that the plaintiffs cannot maintain their action of covenant to enforce the payment of this call, because the Company has not received a certificate of complete registration. And the section relied on by the defendant is the 23d of stat. 7 & 8 Vict. c. 110. Now, although the defendant expressly covenants to pay any part of the amount subscribed by him, when required by the provisional directors or committee of management so to do, it seems clear that if the requisition to pay is in violation of any statutory enactment, the defendant’s covenant cannot be legally enforced. This reduces the matter to the simple question whether the requisition to pay alleged in the declaration, and which is alleged in the plea to be a call, was or was not in violation of the law. The 23d section seems conclusive of the illegality of the call. That section is very precise as to what may be done by a Company

after provisional and before complete registration, and what may not; and it is expressly applicable to railway Companies, among others. It enacts that, on provisional registration, it shall be lawful for the promoters of such Company (and by the 2d section promoters are all persons acting in the formation and establishment of a Company at any period prior to complete registration) to allot shares and receive deposits by way of earnest thereon, at a rate not exceeding 10s. for every 100l. on the amount of every share in the capital of the intended Company; and also, as to railways, &c., in addition to that *409] sum, such further sum per 100l. on the amount of *every such share, as may be required by the standing orders of either House of Parliament to be deposited before obtaining the Act. And after mentioning other things which it shall be lawful for the Company to do before complete registration, the section continues. "But not to make calls, nor to purchase lands," &c. Now, this section seems to me applicable to the present case; and the result appears to be that making any calls before complete registration is unlawful. The 25th section shows that, even after complete registration, in the case of railway Companies, the power to make calls, or, in the words of that section, "to receive instalments from shareholders," is especially restricted to "the sum or per-centage necessary to be deposited in compliance with the standing orders of either House of Parliament, or such other sum as may be requisite for obtaining the Act of Parliament for executing the work." But it does not appear by this record that the action of covenant is brought for the payment of any sum which is to be applied to preliminary expenses, or to any other particular purpose. And therefore I take it, in the language of the plea, that the action is brought to enforce the payment of a call made before complete registration; which, by the 23d section, appears to be illegal. Although in the argument, as well as in the judgment of the Court below, it is said that the action was brought to enforce the payment of preliminary expenses only, I find nothing on the record to that effect, when reading the declaration and the 5th plea together. Upon this demurrer, the averments in the plea must be taken to be true; and, if so, I think there is a complete answer to this action, and *410] that therefore the judgment ought to be reversed.

*CROWDER, J., then read the judgment of COCKBURN, C. J.(a)
 COCKBURN, C. J.—I concur with the Court below in thinking that on the 4th plea there should be judgment for the plaintiffs. Provided the Company was provisionally registered at the time the defendant was called upon to pay the money now sought to be recovered, I agree in holding it to be quite immaterial that the provisional registration may have subsequently expired, and the Company have thus ceased to be provisionally registered at the time the action was brought. I concur also in opinion that on the 2d plea our judgment should be for the plaintiffs. This plea, which is pleaded on equitable grounds, amounts, in substance, to this, that the money covenanted to be paid by the defendant in the subscription contract (of which the

(a) Willes, J., suggested that this judgment could not be read, as Cockburn, C. J., had now ceased to be a Judge of the Court of Common Pleas, and had become Chief Justice of the Court of Queen's Bench, and the appeal was from the decision of that Court. Crowder, J., said that, if the objection was valid, the judgment might be taken as part of his own.

money now claimed forms a part) was subscribed in order to obtain an Act of Parliament for the purpose of establishing a Company to be called "The Swansea Docks and Mineral Valleys Railway Company," and for enabling such Company to make the railway and works contemplated by the undertaking; that, before the present demand was made on the defendant, the projected undertaking and the intention to apply for an Act of Parliament were wholly abandoned, and that, consequently, the defendant ought, in equity, to be relieved from the obligation of his covenant. I concur in holding that this plea is no answer in equity, any more than it would be in law, to the action. The subscription contract contemplates three things: [*411 first, the establishing of the Company; secondly, the application to Parliament for an Act; thirdly, the execution of the works. The money covenanted to be paid under the subscription contract is equally applicable to each of these objects; and the express authority given to the directors to abandon the application to Parliament in respect of all or any part of the undertaking, deprives the subscribers of any claim to immunity or compensation in respect of any expenditure bona fide and legitimately incurred in carrying out the objects of the Company up to the time of abandonment. Now the plea does not allege that preliminary expenses had not been legitimately and properly incurred, prior to the abandonment of the undertaking. Nor, indeed, could it do so, for it was admitted on the argument that the money called for was intended to be applied in payment of preliminary expenses, the defendant's contention being that these expenses ought to fall, not on the subscribers, but on the promoters of the undertaking. But as, according to the view I take of the subscription contract, these expenses, being necessary to the general undertaking, ought to be borne by the general funds of the Company; so far from the facts set forth affording any equitable ground of defence, the plea is, in my opinion, an inequitable attempt on the part of the defendant to throw on the promoters and directors a burden to which they ought not to be subjected.

This being the opinion I entertain on the merits of the case, I the more regret that I am unable to concur in the judgment of the Court below on the demurrer to the 5th plea. On this, as the record [*412 now stands, I cannot but think that our judgment should be for the defendant. The substance of that plea is, that the action is brought by the plaintiffs, as trustees, for the benefit of the Company and of the provisional directors, for the purpose of making and enforcing from the defendant a call of 2*l.* 10*s.* per share on twenty shares of 20*l.* each; that the Company never obtained complete registration, conformably to the provisions of stat. 7 & 8 Vict. c. 110; and that, consequently, a call could not lawfully be made. Now the facts set forth in this plea being admitted on the record, a question arises whether the present action is not barred by the effect of the 23d section of stat. 7 & 8 Vict. c. 110. That section, which is expressly made applicable to an undertaking for the construction of a railway, where the authority of Parliament is required, and which, therefore, clearly applies to such a Company as the present, fixes and limits the powers of Companies when provisionally but not completely registered. It authorizes all Companies so circumstanced to

receive deposits by way of earnest, to the extent of 10s. in each 100l.; and, in the case of Companies for the execution of works which cannot be executed without the authority of Parliament, it enables them to receive such further sum on the 100l. as may be required by the standing orders of either House of Parliament to be deposited; but it expressly prohibits them from making calls. Now, fully conceding that, if the amount now claimed had come to the hands of the plaintiffs in the shape of a deposit, it might properly have been applied to the payment of preliminary expenses, still, as it stands admitted on this record that the money is claimed by virtue *413] of a call made on behalf of the Company, I do *not see how we can refuse to give effect to the plea, without setting at nought the positive enactment of the statute. A ground was, indeed, taken in the Court below, which, if valid, would no doubt get rid of the difficulty. It was said that, the very object of a subscription contract being to provide for preliminary expenses, the 23d section of the Act did not apply to such a contract, but was intended to protect allottees against calls. The whole of this reasoning appears to me to be fallacious. This subscription contract does not contain, directly or indirectly, any reference to "preliminary expenses," as such, and it is only because, as I have before pointed out, such expenses come necessarily within the scope of the purposes for which the parties to such a contract agree to contribute, that they are payable from the common fund. Again, it is a mistake to suppose that a subscription contract is entered into with a view to such expenses. A subscription contract embraces the whole scope of the undertaking, and is necessary as a preliminary contract, not only to give authority to the provisional directors or committee, but, more especially, to satisfy the standing orders of Parliament, which will not suffer a bill, the object of which is to confer the powers required by such a Company, to be entertained, until satisfied that the undertaking is a substantial and genuine one by the fact that a given proportion of the required capital has been actually subscribed for. It seems to me equally erroneous to say, that the 23d section was intended only to protect allottees from calls, and not to discharge those who have executed a contract binding themselves to pay preliminary expenses. The argument presupposes, first, that allottees do not execute the *414] subscription contract, *whereas they always do; secondly, that a subscription contract is specially referable to preliminary expenses; but this, as I have already shown, is an untenable position. A subscription contract has no more reference to preliminary expenses than to any other expenses incidental to the undertaking. The position that the 23d section applies as much to calls made under a subscription contract as to calls made after a final deed of settlement, or after an Act of Parliament has been obtained, appears to me to receive the strongest confirmation from the 25th section of the Act. That section, which fixes and limits the powers of Companies on complete registration, especially prohibits, amongst others, a railway Company, where works cannot be executed without obtaining the authority of Parliament, from exercising the power to receive instalments from the shareholders, beyond the sum or per-centage necessary to be deposited in compliance with the standing orders, or such other

sum as may be necessary for obtaining the Act of incorporation, or an Act for obtaining the authority of Parliament to execute the work. Now, if the exercise of the power of taking instalments is prohibited, except to the extent limited, even after complete registration, and that without any distinction between a subscription contract and any other; still less, it would seem, can it have been the intention of the Legislature to permit its exercise, where the registration is provisional only. It was indeed strenuously argued, that the 25th section has no application to the case, inasmuch as it was contended that that section applied only to Companies which had no subscription contracts, and not to Companies having such contracts and coming within sect. 9 of the Act. To me this argument appears to be wholly without foundation. The *Act, it is true, makes a distinction between the two sorts of Companies, as regards the conditions of complete registration. While, by sect. 7, in the case of Companies in general a deed of settlement with certain specified requisites is a condition precedent to complete registration; by sect. 9, Companies for carrying on works which cannot be executed without the authority of Parliament are entitled to such registration after having deposited such deeds of partnership or subscription contracts as are required by the standing orders of Parliament. But, as regards the effects both of provisional and complete registration, both sets of Companies are legislated for in the same sections: as regards the effects of provisional registration, in the 23d, where, after general provisions applicable to all, especial provisions of extension of power on the one hand, and restriction on the other, are introduced in respect of Companies requiring the authority of Parliament: as regards complete registration, in the 25th, where, after general provisions applicable to all, there follows the provision already referred to, restricting the power of the Company to receive instalments beyond the limits before pointed out. Everything tends to show that this provision applies to the Companies referred to in section 9. The terms are general; the corresponding section, as to the effects of provisional registration, applies to these Companies; there is no other section, except the 25th, which settles the powers of these Companies on complete registration, and it is impossible that the Legislature can have intended to omit them in so important a particular; they are as much within the mischief intended to be prevented as any other conceivable Companies can be, namely, the danger of the subscribers' money being unnecessarily expended by the *directors before the Act of incorporation or the authority of Parliament for the undertaking has been obtained. Lastly, and which is perhaps the most conclusive argument of any, there is no other class of Companies to which the provision in question can apply; for there is no Company for the execution of an undertaking of this kind requiring the authority of Parliament, which must not, in compliance with the standing orders, deposit a subscription contract as a condition precedent to the bill being entertained by Parliament. But if the 25th section would prohibit the receipt of any instalment beyond the limit it prescribes (and it makes no distinction between a subscription contract and any other) even after complete registration, a fortiori (as I have before observed) must we in construing the 23d section apply

its prohibition to such a payment upon provisional registration only. It may be that if this action were brought to recover the amount merely of the deposit which the statute has authorized to be received, and the plaintiffs' claim had been specifically addressed to such deposit, and limited to its amount (though this is not quite clear, nor do I wish to be understood as stating it as my deliberate opinion), it would be within the equity of the statute; but there is nothing to show that this claim is so limited. It may be that the preliminary expenses have exceeded the amount which might, conformably with the statute, have been exacted as a deposit or expended in going to Parliament. It may be that this call has no reference to preliminary expenses at all. It is, indeed, said that if the present demand were open to any such exception, it should have been so averred specifically in the plea. But in this I cannot agree. The statute has taken a distinction between preliminary payment by way of deposit, and *417] *calls. It has permitted the former and forbidden the latter. The plea alleges that this is a call. If it be so, it is prohibited by the statute, and, therefore, cannot be enforced. If it be not so, it is for the plaintiffs to meet the question as one of fact on the record. If, for instance, this had been undeniably the case of such a call as would beyond dispute have fallen within the prohibition of the statute, how could we have refused to give effect to a plea framed as this is? Would it have been incumbent on the defendant, in addition to saying that this was a call by a Company not completely registered, to have averred that it was not a call made for the payment of a deposit, or of preliminary expenses? The statute prohibits "calls" made by a Company thus circumstanced, generally; why is the defendant to do more than say that this is a "call" to bring himself within it? If this be not a call, the fact should be traversed, or circumstances set out in reply, from which the Court may see that this is not a "call" within the meaning of the statute; whereas, at present, the fact stands admitted.

I am of opinion, therefore, that as the record now stands the defendant is entitled to judgment; but I would give the plaintiffs the opportunity of amending the record if the facts of the case make it desirable for them to do so. Irrespective of the merits of the particular case, I have thought it necessary to go fully into the legal bearings of the question, because it seems to me very important to determine whether subscription contracts like the present are or are not within the 23d and 25th sections of stat. 7 & 8 Vict. c. 110. In my opinion they are.

Judgment affirmed.

*418] *IN THE EXCHEQUER CHAMBER. Nov. 26.

(Error from the Queen's Bench.)

HALL v. WRIGHT.

[Reported, E. B. & E. 765 (E. C. L. R. vol. 96).]

IN THE EXCHEQUER CHAMBER. Nov. 26.

(Error from the Queen's Bench).

WARLOW v. HARRISON.

[Reported, 1 E. & E. 295 (E. C. L. R. vol. 102).]

IN THE EXCHEQUER CHAMBER. Nov. 26.

(Error from the Queen's Bench).

REGINA v. FOX.

[Reported, 1 E. & E. 746 (E. C. L. R. vol. 102).]

***IN THE EXCHEQUER CHAMBER. Nov. 28. [*419**

(Error from the Queen's Bench).

WARD v. LOWNDES.

[Reported, 1 E. & E. 956 (E. C. L. R. vol. 102).]

MEMORANDUM.

In this Vacation, Sir Richard Budden Crowder, Knight, one of the Judges of the Court of Common Pleas, died. He was succeeded by Sir Henry Singer Keating, Knight, Her Majesty's Solicitor-General, who, upon being called to the degree of the coif, gave rings with the motto "Fortitudine et constantia."

William Atherton, Esq., one of Her Majesty's Counsel, was appointed Her Majesty's Solicitor-General, in the room of Sir Henry Singer Keating. He shortly afterwards received the honour of Knighthood.

END OF MICHAELMAS VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

May Term,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1860.

The Judges who usually sat in banc in this Term were,—

COCKBURN, C. J.

CROMPTON, J.

WIGHTMAN, J.

HILL, J.

IN THE EXCHEQUER CHAMBER. *Jan. 12, 1860.*

(Error from the Queen's Bench).

THE NORTH STAFFORDSHIRE RAILWAY COMPANY *v.*
PEEK.

[Reported E. B. & E. 986 (E. C. L. R. vol. 96).]

The QUEEN *v.* NEWMAN and Others, Justices of GLOUCES-
TERSHIRE. *Jan. 13.*

At the hearing, by justices, of an information laid against A. for non-payment of a sewers'-rate to which he had been assessed by Commissioners acting under a local Act, which incorporated The Public Health Act, 1848, 11 & 12 Vict. c. 63, A. disputed his liability to the rate, on the ground that the premises in respect of which he was rated were drained by a private sewer, and derived no benefit from the sewers under the control of the Commissioners. The justices, however, made an order upon him to pay the rate, and refused his application to them to state a case, under stat. 20 & 21 Vict. c. 43, for an appeal to this Court from their decision. Held, that the justices were right in their refusal; for that stat. 20 & 21 Vict. c. 43, was inapplicable, since an appeal against the order of the justices would, in effect, be an appeal against the rate; which appeal, by sect. 135 of The Public Health Act, 1848, lay only to the Quarter Sessions.

J. J. POWELL had obtained a rule, calling upon H. W. Newman, E. I. B. Marriott, W. Jones, and *D. Pyrke, justices of Gloucestershire, to show cause why they should not state a case for [*421 the opinion of this Court, pursuant to the provisions of stat. 20 & 21 Vict. c. 43.

It appeared, from the affidavits on which the rule was obtained, that Simon Borradell, of the borough of Cheltenham, was summoned before the justices to answer an information which charged that he, being a person duly assessed to a rate duly made on 7th May, 1859, by the Commissioners acting under and by virtue of The Cheltenham Improvement Act, 1852,(a) in the sum of 1s. 10d., had failed to pay the same. An attorney appeared for him, and claimed exemption from the rate on the grounds that the premises in question were sufficiently drained by a private sewer, over which the Commissioners had no jurisdiction; that no improvement or benefit had been derived by the defendant, or by the neighbourhood in which he resided; and that no sewer or other improvements had been made in or near to his residence.

The justices convicted the defendant, and ordered him to pay the said sum of 1s. 10d. and costs. Notice was then given that the defendant was dissatisfied with the decision, and that he required the justices to state a case; but they refused to do so, and granted a certificate of such refusal. The defendant had paid a rent of 5s. a year for the use of a private sewer, which had been made for the purposes of profit, and did not directly or indirectly communicate with any sewer belonging to the said Commissioners, and was a sewer which had never vested in them.

**Phipson* now showed cause.—The applicant has mistaken [*422 his remedy. The Public Health Act, 1848, 11 & 12 Vict. c. 63, is incorporated with the Cheltenham Improvement Act, 1852;(a) and by sect. 135 of the former statute, “any person who shall think himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any justice or justices, in any case in which the penalty imposed or the sum adjudged shall exceed the sum of 20s., may appeal to the Court of General or Quarter Sessions holden next after the making of the rate objected to, or accrual of the cause of complaint.” If therefore, the appellant thought himself aggrieved by the rate in question, his proper course was to appeal to the Quarter Sessions held next after the making of the rate. Upon it appearing to the justices, when he was brought before them, that the rate was duly made and was unappealed against, they had no jurisdiction to inquire into any objections to the validity of the rate, but were bound to enforce it: *Churchwardens, &c., of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59); *Regina v. Justices of Kingston-upon-Thames*, E. B. & E. 256 (E. C. L. R. vol. 96). The justices have, therefore, no power to state a case under stat. 20 & 21 Vict. c. 43, the provisions of which are inapplicable: *Walker v. Great Western Railway Company*, ante, p. 325. (He was then stopped by the Court.)

J. J. Powell, in support of the rule.—The case is within the scope of stat. 20 & 21 Vict. c. 43. By sect. 103 of The Public Health Act,

(a) Stat. 15 & 16 Vict. c. 1, local and personal, public.

resulted to defendant therefrom, he, defendant, had been and was wholly discharged from all liability to pay the amount of the said note, or any part thereof. Issue thereon.

At the trial, before Willes, J., at the last Spring Assizes for the Southern Division of Lancashire, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

Titterington, the person mentioned in the pleas, requiring a loan of 150*l.*, applied to the defendant upon the subject, and the defendant wrote the plaintiff a letter requesting him to call on Titterington, which the plaintiff did. Titterington then asked the plaintiff to lend the 150*l.* to him. The plaintiff drew a check for the money, less three *427] months' interest at the rate of 20 per cent, and gave it to Titterington, and it was duly paid. He also drew out a joint and several promissory note, being the note on which the action was brought, and gave it to Titterington, telling him to sign it himself, which he did, and to obtain the defendant's signature to it as his surety, and then to return it so signed to him, the plaintiff. This Titterington did, and the plaintiff received the said note accordingly, signed by the defendant as maker. When the note became due, Titterington paid to the plaintiff another three months' interest at the rate of 20*l.* per cent., and in advance, and received from the plaintiff the following receipt.

"£7 10*s.*

"June 26, 1858.

"Received from Mr. Titterington 7*l.* 10*s.* for interest due 26th September next, on his joint note.

"JOS. GREENOUGH."

At the expiration of these three months Titterington paid to the plaintiff another three months' interest at the rate of 20*l.* per cent., and in advance, and received from the plaintiff the following receipt.

"£7 10*s.*

"September 28th, 1858.

"Received from Mr. Titterington 7*l.* 10*s.* for renewal of his joint note to 26th December next.

"JOS. GREENOUGH."

These payments were made without any consent or knowledge of the defendant, who was not informed, nor did he know of them until the latter end of October, when Titterington became insolvent.

The jury found that defendant was surety as between himself and Titterington, and that plaintiff knew that fact, but that he did not agree, nor did the defendant stipulate, that he should be considered *428] or treated by the plaintiff as surety, or otherwise than as a maker of the note.

The question for the Court was, Whether these facts proved the first and second pleas, or either of them.

If the Court should be of opinion that they did not, the verdict was to stand; but should the Court be of opinion that both or either of the pleas were or was proved, the verdict was to be set aside, and a nonsuit or verdict for the defendant entered.

Sir *William Atherton*, Solicitor-General, for the plaintiff.—The facts failed to prove either of the pleas. The finding of the jury negatives the allegation in the pleas, that the note was delivered to the plaintiff upon the terms that the defendant should be liable on it only as surety for Titterington. This allegation is clearly material; for mere knowledge by the payee of a note, upon the face of which the signatures

of two persons appear as makers, that as between those persons one has signed merely as surety for the other, does not, of itself, apart from an express agreement to the contrary, deprive the payee of his right to treat both persons alike as principals. [CROMPTON, J.—Can you distinguish the present case from *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90)?] In that case, the averment in the plea, that the plaintiff expressly agreed with the defendant that the latter should be liable on the notes as surety only, was admitted by the demurrer. It must, however, be conceded that the Court did not ground their judgment upon the existence of that agreement. In the similar case of *Strong v. Foster*, 17 C. B. 201 (E. C. L. R. vol. 84), however, the Court of Common Pleas seems to have *thought such an agree- [*429 ment an essential part of the defence. [WIGHTMAN, J.—You are really asking us to overrule *Pooley v. Harradine*, 7 E. & B. 431.]

PER CURIAM.(a)—*Pooley v. Harradine* is conclusive in favour of the defendant. Judgment for the defendant.

(a) Cockburn, C. J., Wightman, Crompton, and Hill, J.

IN THE EXCHEQUER CHAMBER. June 15.

(Error from the Queen's Bench.)

GREENOUGH v. McCLELLAND.

For head-note, see ante, p. 424.

FROM the above decision the plaintiff appealed.

Sir *William Atherton*, Solicitor-General, for the appellant.(a)—The Court below were wrong in holding that *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90), was a conclusive authority against the appellant. Although the judgment in that case was not rested upon the fact there admitted on demurrer, that the plaintiff had expressly agreed with the defendant to hold him liable as surety only, it may well be that the judgment would have been different had a jury found as a fact, as they have done in the present case, that no such agreement was entered into. In *disregarding that finding, the [*430 Court below have decided that mere knowledge by a creditor that one of two persons who both contract with him as principal debtors is, as between himself and his co-debtor, a surety merely, binds the creditor, in equity, to treat that person as a surety, and not as a principal debtor. *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90), was decided on the authority of *Davies v. Stainbank*, 6 De G. M. & G. 679, but in that case the Lords Justices were satisfied, on the evidence, that the plaintiff *Davies* became liable to Messrs. *Stainbank*, the defendants, merely by way of suretyship for the principal debtor. To allow the present defendant to set up that he was only a surety for *Titterington*, is to allow him to vary the language of the written instrument, the promissory note, which he, as well as *Titterington*, signed as a maker. [WILLIAMS, J.—Had the plaintiff made the agreement, which you contend was necessary, to treat the

(a) Before Williams, Willes, and Byles, J., Martin, Channell, and Wilde, B.

defendant as a surety, though he appeared on the face of the note to be a principal, evidence of that agreement would have equally varied the written instrument. The principle of the decision in *Pooley v. Harradine* appears to be, that knowledge by a creditor of the existence of the relation of principal and surety, inter se, between two persons who both enter into a written contract with him as principal debtors, raises an equity, dehors the written instrument, which precludes the creditor from enforcing the contract, to its full extent, against that one of them who is only a surety.] That is, undoubtedly, the doctrine deduced by the Court, in *Pooley v. Harradine*, from the language of Lord Chancellor Cottenham in *Hollier v. Eyre*, 9 Cl. & F. 1, 45. But whatever may be the rule in equity, *Manley v. Boycot, 2 E. & B. 46 (E. C. L. R. vol. 75), decides that, at law, such mere knowledge on the part of the creditor will not bind him, unless he expressly agrees, at the time of taking the written instrument, to treat one of the parties to it as a mere surety. [WILLIAMS, J.—That case was decided before defendants were allowed to plead equitable defences.] The reasons given for the judgment are cogent to show that there is no equity in such a defence as this. There should be but one rule both at law and in equity; and the rule laid down in *Manley v. Boycot* is the correct one. In *Strong v. Foster*, 17 Com. B. 201 (E. C. L. R. vol. 84), the defence was raised by an equitable plea, and the Court appears to have considered, though it became unnecessary to decide the point, that an allegation in the plea that the plaintiff accepted the defendant as surety only was material. Both in that case and in *Rayner v. Fussey*, 28 L. J. N. S. Ex. 132, where also there was an equitable plea containing a like allegation, the defence broke down in proof. The weight of authority is against the decision in the Court below; and the finding of the jury distinguishes the present case from those in which the existence of an agreement by the plaintiff to look to the defendant as a surety only, here directly negatived, has been either assumed or left in doubt.

Crompton Hutton, contra, was not called upon.

WILLIAMS, J.—We are all of opinion that the judgment of the Court below must be affirmed. There can be no doubt but that we are called on to deal with the case as if we were sitting in a Court of equity, and according to what we believe to be the doctrine of that Court. And *we think that it is clear, upon the authorities, that the defendant would be held discharged in equity from all liability as a principal, on the ground that the plaintiff had knowledge, when he took the note, that the relation of principal and surety existed between Titterington and the defendant. It is found as a fact, no doubt, that the plaintiff did not agree to treat the defendant as a surety, or otherwise than as a maker of the note. Therefore, had this case occurred before the coming into operation of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, that is, had the plea been pleaded at common law, it would, according to *Manley v. Boycot*, 2 E. & B. 46 (E. C. L. R. vol. 75), have failed, by reason of the finding of the jury. The plea is, however, pleaded upon equitable grounds, so that the question is, what is the view which a Court of equity would take of the liability of the defendant. Is it considered essential, in equity, to the relief of a surety, that an agreement by

the creditor to look to him as a surety only should form part of the contract between them? The contrary has been decided. A notion was at one time entertained in the Courts of law, that the ground upon which the surety was relieved in equity was this; that whereas the Courts of law adhered to the strict language of the original contract and felt bound by its terms, a Court of equity would take a larger view and disregard the precise terms of the contract. It does not appear, however, that the Courts of equity have ever acted on any such view. Lord Chancellor Cottenham, in giving judgment in the House of Lords in *Hollier v. Eyre*, 9 Cl. & Fin. 1, 45, clearly explains the doctrine on which the Courts of equity proceed. He says: "The question as to whether the plaintiff as between himself *and the grantees was a principal in the grant of the annuity, [*433 or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves: no extraneous evidence is admissible for that purpose." He thus puts the rule exactly as a common law Judge would lay it down in a common law Court. He then goes on to say, "But although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others; and if it was established that such was the case as between the plaintiff and Lynch, and that the grantees knew that such was the case, they might by their dealing with Lynch have raised an equity in favour of the plaintiff, entitling him to the protection of a Court of equity against the legal consequences of the instruments he joined in executing. This distinction is perfectly well settled, and is the ground of many of the decisions." Thus he expressly puts the doctrine in equity upon this ground, namely, that, although the Courts of common law and of equity agree on the principle that the question whether one party to a written contract has become liable to another as a principal or only as a surety, must be ascertained from the terms of the contract itself, yet if a person, with knowledge that one who has contracted with him as a principal is really but a surety for a co-contractor, gives time to the real principal, an equity arises, in consequence, which in a Court of equity entitles the surety to be discharged from the contract. So, in *Davies v. Stainbank*, 6 De G. M. & G. 679, 696, Lord Justice Turner says, "This Court, as I apprehend, has at all times exercised jurisdiction in cases of this nature. It is in the eye of this Court, a fraud in a creditor to proceed to law against a surety, *after he has [*434 agreed with the principal debtor to enlarge the time for payment of the debt; and this Court relieves against the fraud." The doctrine in equity is thus placed beyond all doubt. A common law lawyer might feel difficulties in the way of arriving at such a doctrine. He might consider that there is nothing illegal in an agreement by one who is in reality a surety, to forego his rights as a surety and submit to all the liabilities of a principal; and that a party to a written instrument who on the face of it contracts as a principal, thereby enters into such an agreement. I may say, for myself, without disrespect to the Courts of equity, that I do not understand why they should have disregarded such considerations; but that they have done so, and have established the doctrine which I have stated, is certain. I agree with the Solicitor-General that the facts of the present case

are not quite the same as those in *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90); there having been an admission in that case, that the plaintiff had agreed to accept the defendant as a surety only. But in *Pooley v. Harradine*, the Court, after carefully reviewing all the previous authorities, conclude their judgment by saying: (a) "We give our judgment for the defendant on the present plea, on the ground that it appears to us sufficiently to state that the relation of principal and surety existed between the defendant and the principal debtor, inter se, and that the plaintiff had knowledge of that fact when the notes were made and received by him, and when he entered into a binding agreement to give time to the principal debtor." The Court therefore thought the two facts, namely, the existence of the relation of principal and surety between the debtors inter se, and the *435] knowledge of its existence by *the plaintiff, conclusive. The same two facts exist in the case now before us, and the principle of the decision in *Pooley v. Harradine* is exactly applicable. It is incumbent upon us to come to the same conclusion; nor can we, after the clear enunciation, by Lord Chancellor Cottenham and Lord Justice Turner, of the doctrine in equity, allow the question whether the defendant is entitled to relief to be treated as depending in any way upon the construction of the original contract.

The other Judges concurred.

Judgment affirmed

(a) 7 E. & B. 441.

The NEW RIVER COMPANY, Appellants, v. SARAH JOHNSON, Respondent. Jan. 18.

A person who sustains injury from the execution of works authorized by a statute, is not, generally speaking, entitled to compensation, under the compensation clauses of the statute, unless the injury sustained is such as, had the works not been authorized by the statute, would have given the claimant a right of action.

Appellants, in the execution of works authorized by a local Act, which incorporated The Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, intercepted water from percolating underground into a well belonging to respondent; and also abstracted from the well water which had already so percolated into and was in it. The said Act, 10 & 11 Vict. c. 17, enacts, by sect. 12, "that in the exercise of" the powers conferred by the Act "the undertakers shall do as little damage as can be," "and shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers."

Held that, inasmuch as, apart from the statute, no action would have lain by respondent against appellants in respect of either the interception or the abstraction of such water, the statute gave respondent no right to compensation in respect of either.

CASE stated by justices under stat. 20 & 21 Vict. c. 43.

On 3d February, 1859, the appellants appeared before the justices of the borough of Hertford, in pursuance of a summons issued upon the complaint of the respondent, who complained that the appellants, in making and constructing a certain sewer or drain commencing in *436] the *parish of Saint Andrew, in the said borough, and terminating in the said parish by a junction with another sewer or drain, under the provisions of the New River Company's (Hertford Sewerage Diversion) Act, 1854, 17 & 18 Vict. c. xxxix., (a) and of the several Acts incorporated therewith, drained the spring of a certain well belonging to a messuage and premises situate in the North

(a) Local and personal, public.

Crescent, in the said parish, belonging to the respondent, in consequence whereof the respondent had been compelled considerably to deepen the said well, and to do other works attending the same, in order to obtain a proper supply of water, and had incurred expense or sustained damage to the amount of 2*l.* 16*s.* 7*d.*

It was proved that the appellants were authorized by stat. 17 & 18 Vict. c. xxxix., a copy of which accompanied and was to be taken as part of the case, to construct certain sewers, drains, and other works in and near the town of Hertford. That by the 3d section of the said Act there were incorporated therewith several provisions, clauses, and sections of The Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, amongst which were those with respect to the construction of the waterworks, and with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices; and it was also enacted by the same section that, in construing those sections of The Waterworks Clauses Act, 1847, in connection with the principal Act, the word "Waterworks" should be deemed to include sewers and drains. That, by the 12th section of The Waterworks Clauses Act, 1847, the undertakers were empowered to execute certain works therein named; but it was also provided that *they should make full compensation to all [*437 parties interested, for all damage sustained by them through the exercise of such powers. That, by the 140th and 142d sections of The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20 (incorporated in the said Waterworks Clauses Act, 1847, by the 85th section thereof), it was provided that any damages, costs, or expenses directed to be paid, and the method of ascertaining the amount or enforcing the payment whereof was not otherwise provided for by the said Act, or the special or other Act incorporated therewith, should be ascertained and determined by two justices. That evidence was given by William White, that he was tenant of the respondent's house in the North Crescent, Hertford; that the pump there was supplied from the same well as the next house of the respondent; that, in July, 1857, the road was opened by the appellants in front of his house; that the appellants were working by his house; that, as soon as the ground was dug out to form the sewer, the water in the respondent's well became less in quantity; that the diminution continued till the well became quite dry; that it was never so before; that the well was deepened; that the witness had measured the depth of the water that week and it was twenty inches deep; that the well had been deepened two and a half feet; that he remembered as dry a summer, before, as that of 1857; that the water did not, at the time of giving his evidence, come to the level of the old suction pipe by about a foot. That evidence was also given by Joseph Allcock, who deposed that, in September, 1857, he deepened the respondent's well belonging to the houses occupied by Mr. White and Miss Ellis; that it was quite dry when he *went to it; that he deepened it two feet six [*438 inches; that he saw the well yesterday; that the water then was from ten inches to a foot from the old level; that his charge for doing this was 2*l.* 16*s.* 7*d.*, which was fair and reasonable.

No evidence was tendered on behalf of the appellants, who admitted that the sinking of the water in the well was occasioned by their

sewerage works, and that the sum of 2*l.* 16*s.* 7*d.* had been paid for making good the damage. It was also admitted, on the part of the respondent, that, in the exercise of their powers, the appellants did as little damage as could be. Whereupon the justices considered that the respondent had sustained damage by the appellants, through the exercise of their powers under the said Acts, and made an order for the payment by the appellants to the respondent of the sum of 2*l.* 16*s.* 7*d.*, and costs.

The question for the opinion of the Court was, Whether the order so made as aforesaid was right, and whether, under the circumstances, the appellants were legally liable to pay the compensation ordered. If the Court should be of that opinion, the order was to be affirmed; if not, it was to be quashed.

Woollett, for the respondents.(a)—[It was agreed that the Court should decide whether the appellants would be liable to make compensation to the respondent, in either of the two following cases. First. If they should have cut off the underground supply of water to the respondent's well, before it reached the well. Secondly. If *439] they should have drained the respondent's well of *water which had already percolated into it underground.] First, as to the diversion by the appellants of underground water which had not reached the respondent's well. The appellants will rely upon *Chesmore v. Richards*, 7 H. L. Ca. 349, as showing that they are not liable to make the respondent any compensation on this account. The defendants in that case, however, were owners of the soil on which they sank the well which intercepted the flow of the water underground to the mill of the plaintiff on the adjacent soil; and the case was decided, mainly, on the ground that the right claimed by the plaintiff could not be reconciled with the natural and ordinary rights of the defendants as landowners. Here, the appellants are not the owners of the land on which they construct the sewers; and, but for their Act, they would be trespassers in breaking up the soil. Their rights and powers are therefore limited to those conferred upon them by their Act, 17 and 18 Vict. c. xxxix. The case finds that that Act incorporates sect. 12 of The Waterworks Act, 1847, which, after authorizing the execution of certain works, provides "that in the exercise of the said powers the undertakers shall do as little damage as can be," "and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." These words are large enough to cover the respondent's claim for compensation in respect of the damage she has sustained by the loss of the flow of the water underground, into her well, owing to the appellants' works. [BLACKBURN, J.—Must you not show that the appellants have done the respondent an injury for which she could, but for the Act of Parliament, have brought an action against *440] them?] *Caledonian Railway Company v. Ogilvy*, 2 Macq. Sc. Ap. Ca. 229, and *Re Penny*, 7 E. & B. 660 (E. C. L. R. vol. 90), may be cited as authorities for that proposition. Those cases, however, turned upon the construction to be put upon the expression "injuriously affected" in sect. 68 of The Lands Clauses

(a) And on Wednesday, November 16th, 1859, before Cockburn, C. J., Hill and Blackburn, J.

Consolidation Act, 1845, 8 Vict. c. 18, and ought not to be held conclusive on a question arising under a statute such as the present, in which much more general and comprehensive language is employed. The Legislature, here, intended that every person who should, in fact, sustain damage from the exercise of the powers of the Act, should receive compensation; whether or not the damage sustained would, but for the statutory remedy, have been actionable. In every case where the question is whether the exercise of statutory powers has given a right of compensation to a claimant, the words of the statute under which the powers have been exercised are, alone, to be considered: *Stainton v. Woolrych*, 23 Beav. 225. In *London and North Western Railway Company v. Bradley*, 6 Railway Cases 551, 559, cited in Sir W. Hodges on the Law of Railways, p. 809 (3d ed. by Smith), Lord Chancellor Truro is reported as saying: "Whether an action will lie on behalf of a man who sustains a private injury by the execution of parliamentary powers, exercised judiciously and cautiously, is not an easy question, or rather, it is not easy to come to a conclusion that an action will lie. I entertain a decided opinion (probably, however, erroneous) that no such action will lie. I do not entertain anything like so decided an opinion that a claimant may not work out his claim in the way in which he proposes to do; he may or may not." Secondly: even should the Court be of opinion that **Chasemore v. Richards*, 7 H. L. Ca. 349, is in point against the respondent's right to compensation for the loss of the water [*441 intercepted by the appellants' works from percolating underground into her well; still, the appellants are liable to compensate her for the deprivation of the water which, after having already percolated into the well, has been abstracted by them therefrom. *Chasemore v. Richards* is no authority against that part of her claim. [CROMPTON, J.—But *Acton v. Blundell*, 12 M. & W. 324,† is.] That case is materially qualified by *Dickinson v. Grand Junction Canal Company*, 7 Exch. 282.†

Bovill, contra.—As to the first point, *Chasemore v. Richards* is conclusive against the respondent. The decision of the House of Lords in that case shows that no one can claim any right, under any circumstances, to the flow of water percolating underground. It is quite immaterial whether the person who diverts such water is or is not the owner of the land on which he does the act which causes the diversion. The respondent, therefore, would have had no right of action against the appellants, even had they not been invested with parliamentary powers. And the test of her right to compensation is whether she could, but for the Act of Parliament, have maintained an action. *Caledonian Railway Company v. Ogilvy*, 2 Macq. Sc. Ap. Ca. 229, and *Re Penny*, 7 E. & B. 660 (E. C. L. R. vol. 90), go to the full extent of deciding that this is the proper test; and that a legal injury to a legal right is the only subject of compensation. Then, as to the second point, *Dickinson v. Grand Junction Canal Company* is virtually overruled by **Chasemore v. Richards*; and the authority of *Acton v. Blundell*, which is directly in point against [*442 the respondent, consequently remains unimpeached.

COCKBURN, C. J.—The recent decisions have fully established the principle, which is also in accordance with common sense, that Acts

of Parliament which give to parties injured a right to compensation, must be taken to mean that, while they confer powers of compulsory interference with the rights of property, and take away from the owners of property the right to bring actions, they provide that parties injured by the exercise of those powers shall not be damnified by being deprived of their right of action; and, correlatively, that such persons shall have no right to compensation unless the injury which they have sustained by the exercise of the powers is such as would, but for the provisions of the Acts, have been actionable. In the present case, the respondent complains that the appellants, in interfering with her property under the powers of their Act, have injured her in two respects; first, by preventing water from percolating underground into her well, as, but for the appellants' works, it would have done; secondly, by abstracting from the well water which had already so percolated into and was in it. Now, as to the first ground of complaint, *Chasemore v. Richards* is an express authority that it would not, irrespectively of the Act, have constituted any cause of action; neither, therefore, can it give the respondent any right to compensation under the Act. And, as to the second ground, *Acton v. Blundell* is as plain an authority that no action would have lain in respect of that cause of complaint had the Act never passed; *443] according, therefore, to the principle to which I have adverted, the respondent can have no better claim to compensation on this ground than on the other. I think that it would be matter of regret were any doubt to be thrown upon that principle; and that the Legislature, if it intends to give a right of compensation to parties who may sustain an injury for which no action would have lain, must say so in the most express terms. I am therefore of opinion that our judgment should be for the appellants.

WIGHTMAN, J.—I am entirely of the same opinion. It is said, on behalf of the respondent, that, whether or not she would have had a right of action against the appellants at common law, she is, at all events, entitled to claim compensation from them, under the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, s. 12, inasmuch as she has in fact sustained damages by reason of the exercise by them of their statutory powers. There are several decisions which show that there can be no right to compensation, in cases of this sort, unless, but for the Act of Parliament in the exercise of the powers of which the damage was occasioned, an action would have lain at the suit of the person sustaining the damage. It is said that the language of the section referred to, by which compensation is to be made "for all damages sustained" "through the exercise of" the "powers" of the Act, shows that the compensation is not to be restricted to actionable damage. But we have been referred to no authority to show that such language is to be construed as affecting the general principle that statutory compensation is to be thus restricted. Applying that principle *444] to the facts of the present case, *Chasemore v. Richards*, 7 H. L. Ca. 349, decisively establishes that no compensation can be claimed by the respondent for the interception by the appellants of water in course of percolation towards her well. But it is contended on her behalf that, in respect of the abstraction from the well of all such water as had already percolated to and was in it before the appellants

commenced their works, she would, but for the Act, have had a right of action against them at common law. It seems to me that *Chasemore v. Richards* is decisive against her on this point also; but it is unnecessary to consider whether that be so, as *Acton v. Blundell*, 12 M. & W. 324,† is an express authority that, apart from the Act, no such action would have lain. It is said that *Acton v. Blundell* has been shaken by *Dickinson v. Grand Junction Canal Company*, 7 Exch. 282.† The latter, however, was only a decision of the Court of Exchequer, whereas *Acton v. Blundell* was decided in the Exchequer Chamber. Moreover, in *Chasemore v. Richards* great doubt is thrown upon *Dickinson v. Grand Junction Canal Company*, whereas *Acton v. Blundell* is referred to with approbation.

CROMPTON, J.—I am of the same opinion. I adhere to the expressions of my brother Willes in delivering our joint judgment in *Broadbent v. The Imperial Gas Company*, 7 De G. McN. & G. 436, 456.(a) He there says “We are” “of opinion, that no compensation is given,” “generally speaking, by any compensation clause, for matters not made lawful, but *which, notwithstanding the statute [445 containing or incorporating the compensation clause, remain wrongful acts, for which the remedy by action is not taken away. We consider it to be an universal rule, applicable to this class of statutes, that statutory compensation is given only for acts authorized by the statute in effect for taking away the right of action of the person injured.” I should be sorry that any doubt should be thrown upon the cases which have established this rule. Such being the rule, *Chasemore v. Richards* is conclusive against the respondent’s claim for compensation under the first head of damage. The only matter about which there could reasonably be any doubt is, whether, but for the Act of Parliament giving the appellants power to construct their works, the respondent would have had a good cause of action against them for abstracting from the well water which had already percolated into it. Had this been a case of water running in a defined stream, I should have been sorry to give a positive opinion that the abstraction of it might not have afforded her a cause of action. There may be some distinction between such a case and the present one, of water merely percolating, as to which *Acton v. Blundell*, 12 M. & W. 324,† shows conclusively that no action will lie, and that the only remedy of the owner of a well from which such water has been abstracted is to sink the well deeper. That is a decision of the Court of Exchequer Chamber, of great authority; and the case of *Dickinson v. Grand Junction Canal Company*, 7 Exch. 282,† in the Court of Exchequer, not only does not and could not overrule it, but is itself virtually overruled by the judgment of the *House of Lords in *Chasemore v. Richards*, 7 H. L. Ca. 349, [*446 in which *Acton v. Blundell* is approved and acted upon.

BLACKBURN, J.—I am of the same opinion. I can see no tenable distinction between the language of The Waterworks Clauses Act 1847, sect. 12, and The Lands Clauses Act, 1845, sect. 68. It was at one time open to doubt whether the sustaining actual damage in fact did not, under the provisions respecting compensation to be found in

(a) At the request of Lord Chancellor Cranworth, Crompton and Willes, J., sat with him to hear this case.

these and similar Acts of Parliament, entitle the person sustaining it to compensation, whether or not it would, but for the particular Act of Parliament, have been actionable damage. Now, however, it is well established that there can be no right to statutory compensation unless there would, apart from the statute, have been a right to bring an action for the injury complained of. That the respondent would have had no cause of action against the appellants, had they been without statutory powers authorizing the acts which she complains of, is plain from the concluding words of the judgment of the Court of Exchequer Chamber in *Acton v. Blundell*, 12 M. & W. 324,† where it is laid down “that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour’s well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of *447] an action.” That is conclusive against both *the heads of claim for compensation relied upon by the respondent’s counsel; for *Acton v. Blundell*, so far from being overruled, is confirmed by the judgment of the House of Lords in *Chasemore v. Richards*.

Judgment for the appellants.

The doctrine of *Acton v. Blundell* has been generally followed in this country. The subject is carefully discussed by Prof. Washburn, in his late work on Easements (ch. III. sect. 7), who collects the following cases: *Greenleaf v. Francis*, 18 Pick 117; *Railroad v. Peterson*, 14 Ind. 112; *Smith v. Adams*, 6 Paige 435; *Wheatley v. Baugh*, 25 Penna. St. 528; *Dexter v.*

Aqueduct Co., 1 Story 387; *Roath v. Driscoll*, 20 Conn 538; *Chatfield v. Wilson*, 28 Vt. 49; s. c. 31 Id. 538; *Harwood v. Benton*, 32 Id. 724; *Ellis v. Duncan*, 21 Barb. 230; *Radcliff’s Exor. v. Mayor*, 4 Comst. 195; *Bel lows v. Sackett*, 15 Barb. 96; *Whetstone v. Bowser*, 29 Penna. St. 59; *Parker v. Railroad*, 3 Cush. 107.

THE EAST LONDON WATERWORKS COMPANY, Appellants, v. The Overseers of the POOR of the Hamlet of MILE END OLD TOWN, Respondents. Jan. 18.

By The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 161, a lighting-rate is to be levied in the metropolitan parishes, on the persons and in respect of the property rateable to the poor-rate in the respective parishes. By sect. 165, “in every parish or part of a parish in which, under any” “Act, land is now” “wholly exempted from being rated in respect of” lighting “expenses, such land shall” “be wholly exempted” from the lighting-rate.

At the time that this Act passed, the metropolitan hamlet of Mile End Old Town was lighted under the provisions of a local Act, 1 & 2 Geo. 4, c. lxxii., by sect. 30 of which rates for lighting the hamlet were to be laid upon every person who should “inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments, situate, or being in such of the streets” or other public passages and places within the hamlet, as should from time to time be lighted by virtue of the Act.

Before the passing of stat. 18 & 19 Vict. c. 120, this Court had decided that appellants, a water Company, were not rateable to the lighting-rate, in Mile End Old Town, under stat. 1 &

2 G. 4, c. lxxii., s. 30, in respect of their mains, pipes, and apparatus for conveying water, part of which ran underground through the streets and other public places there.

Held: that, at the time of the passing of stat. 18 & 19 Vict. c. 120, the land occupied by appellants in Mile End Old Town by means of their mains, pipes, &c., was, under stat. 1 & 2 G. 4, c. lxxii., "wholly exempted from being rated in respect of" lighting "expenses" there, within the meaning of stat. 18 & 19 Vict. c. 120, s. 165; and was, consequently, wholly exempted from the lighting-rate levied in Mile End Old Town, under sect. 161 of the latter statute, by respondents, the overseers of the poor.

ON 9th May, 1856, the overseers of the hamlet of Mile End Old Town, in the county of Middlesex, in obedience to an order of the vestry of the hamlet of Mile End Old Town in that behalf, made a rate for *defraying the expenses of sewerage, and also a separate [*448 rate for defraying the other expenses of executing The Metropolis Local Management Act within the hamlet. Against this rate The East London Waterworks Company appealed to the Middlesex Quarter Sessions, and, after notice of appeal had been given, Blackburn, J., made an order, by consent of the parties, that the facts should be stated in a case for the opinion of this Court and judgment entered at the Quarter Sessions in conformity with its decision.

The case stated as follows.

The East London Waterworks Company are occupiers of land in the hamlet of Mile End Old Town, but only by reason of their mains and pipes in said hamlet. In and by the said rate they were assessed in respect of the mains and other pipes, plugs and apparatus fixed in the ground for the conveyance of water, and for the land occupied by them by means of their said mains and apparatus as aforesaid, situate in the several streets and public roads in the said hamlet, and, for the purpose of determining the question raised in the case, the said rate was to be taken to be a separate rate made for defraying the expenses of lighting within the said hamlet, and to be a lighting-rate within the meaning of sect. 161 of stat. 18 & 19 Vict. c. 120. The amount at which the appellants were assessed was not in dispute, if they ought to be assessed.

Previous to the passing of the Act for the better local management of the metropolis, 18 & 19 Vict. c. 120, the lighting of the said hamlet was regulated and the expenses thereof defrayed under the provisions of a local Act, 1 & 2 G. 4, c. lxxii., (a) entitled "An Act to light and *otherwise improve the streets and other public pass- [*449 ages and places within the hamlet of Mile End Old Town, in the parish of St. Dunstan Stepney otherwise Stebonheath, in the county of Middlesex," which was to be considered part of the case: by the 30th section of which it was enacted: "That for all and every the purposes of this Act the said trustees shall and they are hereby authorized and required to raise from time to time, by rates or assessments, such sum and sums of money as they the said trustees or any five or more of them shall from time to time judge necessary; all which rates and assessments shall be signed by any five or more of the said trustees, and shall be laid upon all and every person and persons who do or shall inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments situate or being in any of the streets, squares, lanes, and other public

(a) Local and personal, public.

passages and places within the said hamlet, according to the yearly value of the same respectively; and the first year for which such rates or assessments shall be made shall commence and be computed from the 24th day of June, 1821; and such rates or assessments shall and may be made and collected half-yearly or quarterly, as the said trustees shall at any of their meetings think proper, and shall from time to time direct, so as such rates or assessments do not exceed in the whole for any one year (for the several purposes of this Act) the sum of one shilling in the pound, and so as all such rates and assessments, from and after the making of the first rate and assessment hereby directed to be made for lighting the said hamlet, shall be laid upon all and every person and persons who do or shall inhabit, hold, use, *450] occupy, be in *possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments situate and being in such of the streets, squares, lanes, and other public passages and places only within the said hamlet as shall from time to time be lighted by virtue of this Act."

Under this Act, in the year 1850, the appellants were assessed to a lighting rate, against which they appealed, and, upon argument of a case reserved by the Quarter Sessions for the opinion of this Court, were successful.^(a) Since that time until the present assessment, the appellants had not been rated or assessed to the lighting-rate in respect of expenses of lighting.

The assessment appealed against was made, under the 161st section of The Metropolis Local Management Act, 18 & 19 Vict. c. 120, upon the appellants, who are persons, and in respect of property, by law rateable to the relief of the poor in the said hamlet.

The appellants contended that they were not liable to be rated in respect of their said property assessed in and by the said rate in respect of the expenses of lighting, because, at the time of the passing of stat. 18 & 19 Vict. c. 120., their said property was, under the said local Act, wholly exempted from being rated in respect of such expenses, and therefore is now wholly exempted by the operation of the said stat. 18 & 19 Vict. c. 120. The respondents contended that the appellants were liable.

*451] The question for the opinion of the Court was, *Whether the appellants were liable to be rated for the expenses of lighting.

If the Court should be of opinion that the appellants were not liable to be rated for the expenses of lighting, then the said assessment was to be reduced by the sum of 12*l.* 10*s.*; otherwise the rate was to be confirmed.

Keane, for the respondents.—The appellants are liable to be rated for the expenses of lighting. The disputed rate is to be taken to have been a lighting-rate made by the respondents under The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 161, which enacts that "such rates shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed upon the net annual value of such property ascertained by the rate for the time being for the relief of the poor;" and puts the rates in all respects on the same footing as

^(a) *East London Waterworks Company v. Trustees for Mile End Old Town*, 17 Q. B. 512.

the poor-rate. Then sect. 165 enacts that "in every parish or part of a parish in which, under any other Act" than stat. 3 & 4 W. 4, c. 90, referred to in the previous part of the section, "land is now rated, in respect of expenses of lighting, at a less amount, in proportion to the annual value thereof, than houses, or is now wholly exempted from being rated in respect of such expenses, such land shall continue to be rated to every lighting-rate made under this Act, at such less amount, or, where such land is now wholly exempted as aforesaid, shall be wholly exempted from such rate." The only question therefore is, whether the land occupied by the appellants was, at the time of the passing of stat. 18 & 19 Vict. c. 120, wholly exempted, under their local Act, 1 & 2 G. 4, c. lxxii., from being rated in respect of expenses of *lighting. The local Act contains no clause of exemption whatever. Its 30th section, under which the ques- [*452] tion arises, is a clause of imposition. No doubt, the omission in that section of the word "land" from the enumeration of the various descriptions of property thereby declared rateable, enabled the present appellants to obtain the judgment of this Court in their favour in *East London Waterworks Company v. Trustees for Mile End Old Town*, 17 Q. B. 512 (E. C. L. R. vol. 79), that their property did not come within any of those descriptions. That decision only shows that the local Act omitted to make land rateable in respect of expenses of lighting; a very different thing from wholly exempting land from such rateability. The Act left land as it found it, untouched by its provisions. In a subsequent case, *Regina v. East London Waterworks Company*, 18 Q. B. 705 (E. C. L. R. vol. 83), the appellants were held to be rateable to a paving-rate in respect of their mains, pipes and other apparatus laid down within the paving district, as for "land" occupied by them; the rate being made under a statute which mentioned "land" amongst the subjects made liable to the rate. That case was followed by *Regina v. Southwark and Vauxhall Water Company*, 6 E. & B. 1008 (E. C. L. R. vol. 88), in which, also, it was held that a water Company are rateable as occupiers of the land which they occupy by means of their pipes. Upon the question whether such land is to be considered as having been wholly exempted from lighting-rates merely because it did not fall within the enacting words of stat. 1 & 2 G. 4, c. lxxii., s. 30, the remarks of the Court, with respect to tithes, in *Hackney and Lamberhurst Tithe Commutation Rent Charges*, E. B. & E. 1, 44, 45 (E. C. L. R. vol. 96), are much in point. The Court, in giving *judgment in that case, say: "The question in regard to the lighting-rate is of more complexity. [*453] It is imposed, by the same 161st section, on the same persons and in respect of the same property. There is, therefore, the same *prima facie* liability. Before the passing of this Act, the lighting-rate was imposed, under the Local Act, 4 G. 3, c. 43, upon 'houses, shops, warehouses, coach-houses, stables, and other buildings:' of course the tithe-owner was not rateable as such; and that he was not rated then can have no effect on his rateability now. By sect. 165 of stat. 18 & 19 Vict. c. 120, any *land* which under any previous Act was exempt from the lighting-rate shall continue exempt: but even if *tithes* could be considered as then *exempt* merely because they did not fall within the enacting words of stat. 4 G. 3, still they are not *land*; and to this

word no larger meaning than its own is given by the interpretation clause, sect. 250, of stat. 18 & 19 Vict. c. 120. And there are reasons to be found in the context for confining its meaning to what it ordinarily imports." "It may perhaps be thought that the Legislature did not intend to impose this rate on the owners of incorporeal hereditaments. But we do not know how to get over the clear words of sect. 161, which make liability to the poor-rate the criterion. We think, therefore, that the appellants are liable to this rate." The Court appear to have inclined to the opinion that positive words of exemption must be used in an Act, in order that property may be said to be "wholly exempted from being rated" under the Act, within the meaning of stat. 18 & 19 Vict. c. 120, s. 165. [BLACKBURN, J.—The point seems to have passed through the minds of the Court, but *454] they do not decide it either way.] No doubt, the language of the Court is not decisive; their view, however, seems to have been that positive words of exemption are necessary in order to get rid of the liability to the lighting-rate, imposed by sect. 161 upon all land liable to the poor-rate. The expression in sect. 165, "wholly exempted" "under any" "Act," must be construed strictly; and it is to be observed that it differs from that in sect. 164; which section exempts from the sewers'-rate property then "entitled to exemption" therefrom. [COCKBURN, C. J.—If the land occupied by the appellants could not be rated under the local Act, was it not, in effect, "wholly exempted" under that Act? CROMPTON, J.—May not the Queen's carriages be said to be "wholly exempted" from liability to turnpike tolls, under the Turnpike Acts, although no liability to such tolls was ever imposed upon them by statute?]

Huddleston, contra, here read from the judgment of Erle, J., in *Plymouth General District Rate*, E. B. & E. 691, 707 (E. C. L. R. vol. 96), holding that a local Act which "made all the tenements forming the populous or town part of" a "borough rateable," "so, by implication, exempted from rate all the tenements forming the residue of the same borough."

Keane continued.—The question whether the local Act there referred to had the effect thus stated by Erle, J., was not discussed in that case. In deciding the present case, the Court can look only to the language of stat. 18 & 19 Vict. c. 120, s. 165, and of the local Act, 1 & 2 G. 4, c. lxxii., s. 30.

Huddleston, for the appellants, was not called upon.

*455] *COCKBURN, C. J.—The construction to be put upon stat. 18 & 19 Vict. c. 120, s. 165, is very plain and simple. It is obvious that the intention of the Legislature was that if the result of the previous legislation had been that land was not, at the time of the passing of the Act, practically rateable to the lighting-rate, the practical exemption thus enjoyed should continue. And I think that the words used are fit and proper to give effect to that intention.

WIGHTMAN, J.—I am of the same opinion. It was manifestly the intention of the Legislature that where land was, by reason of any existing statute, exempt to a certain extent from the lighting-rate, it should continue to have the benefit of exemption to that extent; and that, where it was before wholly exempted, it should remain wholly exempted still.

CROMPTON, J.—The point at issue is very narrow. I agree with the opinion of Erle, J., in that passage of his judgment in *Plymouth General District Rate*, E. B. & E. 707 (E. C. L. R. vol. 96), to which Mr. *Huddleston* has referred us; that an Act which makes a particular description of property in a district rateable, by implication exempts from rate all property in the district not comprised in that description. The property of the appellants was thus, by implication, wholly exempted from the lighting-rate by the local Act. And I have no doubt but that the intention of stat. 18 & 19 Vict. c. 120, s. 165, was to keep in force all exemptions, partial or total, from that rate, which it found in existence.

*BLACKBURN, J.—I am of the same opinion. Mr. *Keane* [*456 would have us interpolate into the 165th section the words “by express enactment” after “wholly exempted.”

Judgment for the appellants.

ALFRED JOHN ACRAMAN, EDWARD THOMAS LUCAS, and JAMES FALLOWS, Assignees of EDMUND GWYER, a Bankrupt, v. BATES. Jan. 20.

On 11th November, 1857, A. assigned to defendant the cargo of a ship belonging to A., and then supposed, both by him and defendant, to be about to set sail for England with the cargo, from the West Coast of Africa. Had defendant sent to the master of the ship in Africa, early notice of the assignment, it would have reached him there before 12th February, 1858, the day on which the ship actually set sail thence on her homeward voyage. Defendant, however, did not send the notice till 23d January, 1858, and the notice then sent never reached the master. On 1st March, 1858, A. became bankrupt. On 14th April, 1858, the ship arrived in England; and on the same day the master, who then first had actual notice of the assignment, delivered the cargo to defendant, notwithstanding a demand of it by A.'s assignees in bankruptcy.

Held, that defendant, not A.'s assignees in bankruptcy, was entitled to the cargo; for that it was not in the possession, order, or disposition of A. at the time of his bankruptcy, with the consent of the true owner, defendant, within stat. 12 & 13 Vict. c. 106, s. 125, the facts of the case showing that defendant was guilty of no laches in omitting to send the master of the ship earlier notice of the assignment.

Quære, whether, under the circumstances, defendant need have sent the master any notice of the assignment at all.

THE first count of the declaration was in trover for the conversion by defendant of the goods of plaintiffs as assignees of Gwyer, a bankrupt. There were also counts for money had and received by defendant for the use of plaintiffs as such assignees, and upon accounts stated between defendant and plaintiffs as such assignees. Pleas. 1. To first count, not guilty. 2. To same, not possessed. 3. To residue of declaration, never indebted. Issues thereon.

The cause came on for trial at the Bristol Summer Assizes, 1858, before Channell, B., when a verdict was taken for the plaintiffs by consent, damages 10,000*l.*, *subject to a case, which stated, in [*457 substance, as follows.

The plaintiffs Lucas and Fallows are the creditors' assignees, and the plaintiff Acraman is the official assignee, of Edmund Gwyer, who for some years previous to, and up to the date of his bankruptcy, which occurred on 1st March, 1858, as hereinafter mentioned, carried on business in Bristol as an African merchant and shipowner, under the firm of Edmund Gwyer & Son, shipping cargoes of goods for sale

and barter on the coast of Africa, and obtaining thence the produce of the country. The action was brought on 25th June, 1858, to recover the value of the cargo of a ship called *Esterias*. This ship was, in March, 1857, the property of the bankrupt, and in that month she sailed from Bristol with a cargo of goods of the bankrupt, under the command of Henry Jewell, as master, whose instructions were to sell and dispose of the outward cargo on the coast of Africa in the usual way, and with the proceeds to obtain and to bring home to Bristol a cargo of palm oil, gold dust, ivory, and other African produce. On 13th May, 1857, the bankrupt wrote and shortly after sent by a ship from Bristol, bound on a voyage to the West Coast of Africa, a letter addressed to the said Captain Henry Jewell, as follows.

"Captain H. JEWELL.

"Bristol, 13th May, 1857.

"Dear Sir,—We send this by The *Porto Novo*, and hope you had a speedy voyage out. Immediately on receipt of this you will make out a bill of lading for what oil you have on board, and forward to us. No doubt, Captain Townsend will call at the Forts, and then he will post it for you. You must make a quick voyage this time to make
*458] up for the last, as we shall expect to *see you home in October. Trusting you will make a prosperous and speedy voyage and enjoy good health,

"We remain, yours very truly,

"E. GWYER & SON."

"Favoured per Captain Townsend, barque *Porto Novo*.

"Captain H. Jewell, *Esterias*, West Coast of Africa."

On 18th July, 1857, the bankrupt wrote and shortly after sent by another ship, bound on a voyage from Bristol to the West Coast of Africa, another letter addressed to the said Henry Jewell, as follows.

"Captain H. JEWELL.

"Bristol, 18th July, 1857.

"Dear Sir,—We have not yet heard from you, but know of your arrival out only by one of Messrs. Lucas's captains writing it on the back of one of our letters. We feel convinced you should make a quick voyage, from what Captain Blannin tells us, as oil was very plentiful, and very few vessels to load to windward. Captain Blannin will leave here again about the 10th September, but we hope you will have left the coast before the time he arrives out; but should you not, you will know by this when to look out for him. You will probably not hear from us again, as no ship will be leaving here. Oil still keeps up to 44*l.* here, and it is uncertain as to its going higher, but it will not be much lower. We hope you have succeeded in buying your oil low, and particularly that you had proper measure.

"Wishing you health,

"We are yours truly,

"EDMUND GWYER & SON."

"Favored by Captain Heslop.

"Captain H. Jewell, schooner *Esterias*, West Coast of Africa."

*459] *The fact of the bankrupt having written and sent these two letters at the time and as above stated was admitted at the trial. There was no proof whether these letters, or either of them, had or had not reached Captain Jewell or the ship *Esterias*. The defendant was and is one of the registered public officers of The West of England and South Wales District Bank, a joint stock banking Company having its principal place of business at Bristol. The bankrupt had been for

some time before August, 1857, a customer of the bank, and in that month, for securing the account current of the bankrupt with the bank, and interest, he entered into a deed, dated 31st August, 1857, a copy of which accompanied and was to be taken as part of the case, purporting to assign the ship *Esterias* to the defendant and Henry Were (since deceased), two of the registered public officers of the said banking Company, for the benefit of the banking Company, as therein mentioned. The said assignment was duly registered by the defendant and Henry Were as mortgagees. The ship was afterwards sold, and the proceeds received by the banking Company. On 11th November, 1857, the bankrupt, for the considerations therein mentioned, executed the deed bearing that date, purporting to assign the cargo, goods, merchandise and premises therein mentioned, to the defendant and Henry Were (since deceased), for the benefit of the banking Company, a copy of which last-mentioned deed also accompanied and was to be taken as part of the case. Henry Were, in the deed mentioned, died before action brought. On 22d January 1858, a notice was drawn up, signed by the defendant and Henry Were, in the words and figures following.

*"Bristol, 22d January, 1858.

"To the Captain or Master of the brig *Esterias* and to all others whom it may concern. [*460

"Sir,—We, the undersigned, John Bates and Henry Were, two of the registered public officers of The West of England and South Wales District Banking Company, do hereby give you notice that, by a mortgage dated 31st August, 1857, Mr. Edmund Gwyer of this city mortgaged the brig *Esterias* to us, on behalf of the banking Company for securing to the said banking Company the balance of his banking account; and that by a deed dated 11th November, 1857, the said Mr. Edmund Gwyer, for the consideration therein mentioned, assigned unto us, by way of mortgage, all the cargo of gold, gold dust, ivory, palm oil, and other goods or merchandise with which the said brig *Esterias* was then laden, and all other, if any, the cargo, goods and merchandise whatsoever which should at any time or times thereafter, before her next arrival at Bristol, be placed on board the said brig, or with which she should be laden at the time of such arrival, and the full benefit and advantage thereof; To hold the same unto us, the said John Bates and Henry Were, our executors, administrators, and assigns, for further securing the said balance of Mr. Edmund Gwyer's banking account. And we hereby give you further notice, and require you to forward to us, and not to the said Mr. Edmund Gwyer, or any person other than to us, the bill or bills of lading of the cargo of the said brig *Esterias*, and so soon as you shall arrive off the coast of England, on your return from your present voyage, to proceed with the said ship and cargo to the port of Bristol aforesaid, and to no other port in the United Kingdom or elsewhere without our authority or by our direction. *And we hereby give you further notice, [*461 and also require you not to part with or dispose of the cargo of the said brig *Esterias*, or any part thereof, to any person or persons whomsoever, other than to us, the said John Bates and Henry Were, and that, upon your arrival in Bristol, you do forthwith give us notice thereof. And we further give you notice not to pay over any moneys which may become due and payable to you, or which

you may receive as captain of the said brig Esterias, or otherwise in connection with her, to any person or persons other than to us, the said John Bates and Henry Were, or to such other person or persons as shall be duly authorized by us to receive the same. And we further give you notice that if you shall hereafter pay, or cause or permit to be paid, any such moneys as aforesaid to any other person or persons, contrary to the notice and requisition hereinbefore contained in that behalf, or shall otherwise act contrary to the terms of this notice and the requisition hereinbefore contained, you will be held liable and answerable for the accounts so paid, or for any loss, damage, or expense, which may be incurred by us, the said John Bates and Henry Were, or the said Banking Company, by reason or in consequence thereof and proceedings at law will be commenced against you.(a)

(Signed),

"JOHN BATES,
"HENRY WERE."

This notice was posted at Bristol on 23d January, 1858, directed to the captain of The Esterias, West Coast of Africa.

At the date of the assignment of 11th November, 1857, before referred to, The Esterias was in fact on the West *Coast of
*462] Africa, taking in and seeking cargo. Henry Jewell, the master of the vessel, had died on 10th June, 1857, and on his death the command of the ship was taken by, and she thenceforth, and until her arrival in the port of Bristol as hereinafter mentioned, remained in the charge of George Crispin, who had gone out as mate.

On 18th January, 1858, the ship was at Cape Lahoo on the West Coast of Africa, still taking in and seeking cargo, and she remained there until 12th February in the same year, when she set sail from thence on her homeward voyage for Bristol.

Cape Lahoo is situate on the West Coast of Africa, between Cape Palmas and Assinee, Cape Palmas being to the west and Assinee to the east of Cape Lahoo.

The more usual mode of communication between Bristol and places on the West Coast of Africa, including Cape Lahoo, is by sailing ships trading from Bristol to the said West Coast, and on an average two or three of these ships sail from Bristol every month. December is a fitting-out month in the year, and more than the average number of such ships sail in that month. The average voyage for these ships from Bristol to Cape Palmas is thirty-five days, and the ships usually touch at and frequently carry letters to Cape Lahoo, Assinee, Cape Palmas, and other places on the West Coast. A vessel called The Warrior sailed from Bristol on 16th December, 1857, as she had been duly advertised to do. She reached Cape Lahoo on 8th February 1858, and a box, a newspaper, and a letter, which had been sent by her to some of the crew of The Esterias, were delivered to the persons for whom they were intended, between 8th and 12th February, 1858, at Cape Lahoo. There is a regular Government mail steamer des-
*463] patched to the West Coast *of Africa, which ordinarily leaves Plymouth on the 24th of every month. A letter posted in Bristol on the 23d of the month, unless directed to go by any particular ship, would in ordinary course go by the Government mail steamer of that month from Plymouth. There is no other port in

(a) The effect of the deed of 11th November, 1857, sufficiently appears from this notice.

England but Plymouth from which the Government African mail goes. The steamer conveying the mail does not touch at Cape Lahoo but touches at Cape Coast Castle, at the south-east of Cape Lahoo, and at Mezurado, at the north-west of Cape Lahoo. Each of these places is distant about two days' voyage by steamer from Cape Lahoo, and a letter sent by the Government mail steamer would be forwarded to Cape Lahoo from one of the above places by sailing vessel or otherwise as opportunity offered. Cape Coast is the nearest place to Cape Lahoo at which the Government mail steamer usually touches. The notice signed by the defendant and Henry Were, and posted at Bristol on 23d June, 1858, not having been directed to go by any particular ship, would find its way to Plymouth, and in ordinary course have been despatched by the Government mail from Plymouth on the 24th of that month. The Esterias, having set sail from Cape Lahoo, as above stated, on 12th February, 1858, reached Bristol on 14th April, 1858, having on board the cargo obtained on the West Coast of Africa.

The net proceeds of this cargo realized upon sale the sum of 5307l. 15s. 10d.

On 1st March, 1858, Mr. Gwyer filed a declaration of insolvency in the Bristol Court of Bankruptcy, and on the same day a petition was presented, and adjudication took place in that Court, and the plaintiff Acraman was appointed official assignee. The other plaintiffs were *appointed trade assignees on 23d March, 1858. The Esterias [*464 arrived in the Bristol river on 14th April, 1858; and on her arrival there on that day one Vowles went on board to take possession of the ship and cargo for the banking Company, and he delivered to Crispin, on going on board, a letter dated 6th March, 1858, as follows.

"Sir,

"We beg to send you a copy of a notice which we some time since forwarded to you; and, as solicitors for and on behalf of the mortgagees of the ship and cargo, we have to request that you will deliver the possession of both ship and cargo to Messrs. M. Whitwell & Son, whom we have authorized to take possession.

"We are, Sir, your obedt. servts.,

"To the Captain or Master of
the brig Esterias."

"SAVERY, CLARK & Co."

This letter had been written on 6th March, in anticipation of the ship's arrival, and the notice enclosed was a copy of the notice hereinbefore set forth, dated 22d January, and posted on 23d January, 1858. The above letter and notice, so delivered to Crispin on 14th April, for the first time gave him notice of the assignment to the defendant (the notice of 22d January having never reached him). There was no proof at the trial of any notice to or knowledge by Crispin, prior to 14th April, of the bankruptcy of Gwyer. Vowles was duly authorized to take possession of the ship and cargo for the defendant, claiming to be the mortgagee thereof, and possession thereof was had by and retained on behalf of the banking Company until the sale and disposition of the cargo by them. Very shortly after Vowles had come on board the Esterias, as aforesaid, and had delivered the above notice and letter, the messenger from the Court *of Bankruptcy [*465 also went on board the ship, and demanded from Crispin the

possession of the cargo on behalf of the assignees of the bankrupt, which Crispin refused to give. The assignees continued to insist on their right to the cargo, but it was delivered by Crispin to Whitwell & Son, on behalf of the banking Company, and by them sold on their account. An order for sale of the cargo was duly made by the Court of Bankruptcy upon the application of the plaintiffs, as assignees of Gwyer, before the action was brought, to enable them to sue in respect of any title which they might have under sect. 125 of The Bankrupt Law Consolidation Act, 1849.

It was agreed that the Court should have power to draw inferences of fact.

If the Court should be of opinion that the plaintiffs were not entitled to recover damages in respect of the conversion of the goods, which constituted the cargo of *The Esterias*, the verdict was to be entered for the defendant.

Montague Smith, for the plaintiffs.(a)—The question is whether the cargo was, at the time of Gwyer's bankruptcy, in his possession, order, or disposition, with the consent of the true owners, the banking Company represented by the defendant. It is contended that it was so within the meaning of The Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 125. The banking Company became the true owners of the cargo on 11th November, 1857, and were bound to send out to Africa, at the earliest reasonable moment after that date, *466] *notice to the master of the *Esterias* of the assignment of the cargo by Gwyer to them; in order to put an end to Gwyer's possession, with their consent, of the cargo. Until that was done, the possession of the cargo by the master of the ship was the possession of Gwyer. The case finds that no such notice was sent out until 23d January, 1858, upwards of two months after the assignment, and too late for the notice to reach the coast where the *Esterias* had been until after Gwyer's bankruptcy. Had the notice been sent immediately after 11th November, or even as late as 16th December, 1857, it would have reached *The Esterias* before she sailed on her homeward voyage, and before the bankruptcy. In *Belcher v. Belamy*, 2 Exch. 303,† notice of the assignment by a creditor to a third person, of a debt due to him from a debtor residing in Australia, was sent out by letter to the debtor in Australia within a reasonable time after the assignment. The creditor having been adjudicated bankrupt before the letter could have reached Australia, it was held that the debt could not be said to remain in the order and disposition of the bankrupt with the consent of the true owner, within the meaning of the Bankrupt Act then in force, 6 G. 4, c. 16, s. 72; the ground of the decision being that the true owner, the assignee of the debt, had taken every possible step to obtain possession of it. [CROMPTON, J.—Is there any authority that it is necessary to give notice of an assignment of chattels?] The same principle must apply to chattels as to debts, in a case where it is impossible for the assignee to take immediate physical possession of the chattels assigned. In *Burn v. Carvalho*, 4 Myl. & Cr. 690, Lord Chancellor Cottenham, *467] *differing from the Court of Exchequer Chamber,(b) held that a letter

(a) On Tuesday, January 17th.

(b) *Burn v. Carvalho*, 1 A. & E. 883 (E. C. L. R. vol. 28). Affirming *Carvalho v. Burn*, 4 B. & Ad. 382 (E. C. L. R. vol. 24).

sent by a merchant in England to his agent at a foreign port, directing the latter to hand over to the agent there of a London house, to which the merchant was indebted, goods of the merchant in his agent's possession there, amounted to an equitable assignment of those goods by the merchant to the London house; and further that, the bankruptcy of the merchant having intervened before it was possible for the letter to reach the foreign port, the goods were not in his order and disposition at the time of his bankruptcy with the consent of the true owner. The Lord Chancellor expressly rested his judgment on the admitted impossibility for the letter to have reached its destination before the bankruptcy happened. He says, 4 Myl. & Cr. 703: "It was argued that the goods in the hands of Rego" (the agent of the assignor at the foreign port) "were in the order and disposition of Fortunato" (the assignor) "at the time of his bankruptcy, and that they, therefore, passed to his assignees;(a) but that argument appears to be excluded by the" "admissions, as I must take it as a fact that there was no possibility of informing Rego of the equitable assignment before the act of bankruptcy. There is, therefore, the absence of the consent of the owner." In *Langton v. Horton*, 1 Hare 549, the equitable title of the mortgagees of the present and future cargo of a ship, which was on her voyage at the time of the mortgage, to the cargo, was held to be perfected by notice of the mortgage sent to the master of the ship and received by him during *the [*468 voyage; *Wigram, V. C.*, in giving judgment, saying (1 Hare 557): "The ship was at sea at the time the deed of assignment was made." "At that time the parties could do nothing more in this country with reference to the cargo, than execute an assignment purporting to assign such interest as Birnie" (the mortgagor) "had,—send a notice of the assignment to the master of the ship,—and await the arrival of the ship and cargo." That is an authority that it is essential, in such cases, to send out notice to the master of the ship of the assignment of the cargo. [CROMPTON, J.—Suppose that, in the present case, the banking Company had sent the master an earlier notice of the assignment, and that the notice had miscarried?] They would then at all events have done their best, and would have done enough, if the notice had miscarried without their default. As it is, however, they must take the consequences of their own neglect.

J. D. Coleridge, for the defendants.—First; the present is not a case of goods having been in the possession, order, or disposition of the bankrupt, with the consent of the true owner, within sect. 125 of stat. 12 & 13 Vict. c. 106. Secondly; supposing that the facts do bring the case within that section, no notice was necessary, under the section, to determine the consent of the true owner to the bankrupt's possession of the goods. Thirdly; even if such a notice was necessary, it was given, and given in perfectly good time. The question whether goods are in the reputed ownership of a bankrupt, at his bankruptcy, is one of fact, not of law. Looking at the facts, here, it appears that at the date of the deed of assignment of the cargo, 11th November, 1857, the ship, as the deed *recited, was on the [*469 West Coast of Africa. The bankrupt's letters of 13th May, and 18th July, 1857, to the captain, clearly show that the bankrupt

(a) i. e. the assignees in bankruptcy.

must, in November, have expected that the ship was on the eve of returning home. Where was the necessity for the defendant, knowing these facts, to send off to Africa a notice which he could have no reason for thinking would reach the ship before she had started on the homeward voyage? [COCKBURN, C. J.—The notice was sent, in fact. The other side would say that, by sending the notice, in January, the defendant showed that he did not then think that the ship was on her way home.] No doubt, as time went on and the ship did not arrive, the defendant became uneasy, and sent the notice by way of caution. The impression which he would derive from a perusal of the bankrupt's letters, before referred to, namely, that the ship might be expected home shortly, accounts for his delay between November and January in sending the notice. [He was then stopped.]

Montague Smith, in reply.—When goods are assigned, which remain in the possession or disposition of the assignor, the assignee, if he wishes to rebut the presumption that they so remain with his consent, is bound to give notice of the assignment to the person who holds them for the assignor. If there is any uncertainty as to where the goods are, the assignee must still do all he can in order to give the notice, if possible. In the present case, granting that there was considerable uncertainty as to the time of the return of the ship, the defendant ought, on that very account, to have sent out notice of the assignment of the cargo at the earliest possible opportunity. [COCKBURN, C. J.—At the date of the assignment *the defendant *470] may well have supposed that the ship was about to sail, if not then actually sailing, homewards from Africa. No doubt arose as to her remaining longer on the coast of Africa, until afterwards. The delay in sending the notice is not, therefore, attributable to the defendant's laches.] It was imperative on the defendant to send early notice of the assignment, to meet the contingency of the further detention of the ship abroad. The event has proved that the notice, if sent with due promptness, would have been in time.

COCKBURN, C. J.—This is a pure question of fact, not of law: and upon this question of fact there is no evidence to satisfy us, as a jury, that the goods were left in the possession, order, or disposition of the bankrupt with the consent of the true owners. The circumstances of the case show that there was no laches on the part of the defendant from which any consent of the true owners can be inferred. Our judgment must therefore be for the defendant.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am of the same opinion. It must not be supposed that we think it was necessary, as a matter of law, to give notice of the assignment of the cargo. But, as a question of fact, we think that no laches has been shown on the part of the defendant. He did everything that he reasonably could under the circumstances.

HILL, J.—I am of the same opinion. We must not be taken to give an opinion either way on the question whether notice of the *471] assignment of the cargo was *necessary. The question for us to determine is one of evidence; whether, that is, there is any evidence before us that the cargo was in the order and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owner. In *Joy v. Campbell*, 1 Sch. & Lef. 328, 336, Lord Redes-

dale explains the possession, order, and disposition of goods by a bankrupt with the consent of the true owner to be "where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled: but in the construction of the Act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner." Applying that doctrine to the facts of the present case, we have to see what was the nature of the bankrupt's possession of the cargo, and whether it was unconscientiously allowed by the true owners to remain in his order and disposition. Looking at the ship's supposed position at the time of the assignment, when she was supposed to be on her voyage home, it is impossible to come to the conclusion that there was anything unconscientious, or any laches in, the conduct of the defendant in not sending out immediate notice to the master of the ship, of the assignment; or that his omission to do so left the cargo in the order and disposition of the bankrupt, at his bankruptcy, within the meaning of stat. 12 & 13 Vict. c. 106, s. 125.

Judgment for the defendant.

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***ISAAC BADGER and PHILIP WILLIAMS v. CHARLES SHAW and JOHN GRIFFIN WALKER, Assignees of JOSEPH WHITEHOUSE and WILLIAM JEFFRIES, Bankrupts.** [*472]

If goods assigned by a bill of sale are allowed by the person to whom the bill of sale is given to remain in the possession of the person who gives it, and the latter, while still in possession of the goods, becomes bankrupt, the mere fact that the bill of sale was, before the bankruptcy happened, duly registered under stat. 17 & 18 Vict. c. 36, s. 1, will not prevent the goods comprised therein from passing to the creditors under the bankruptcy, by The Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 125, as goods in the possession, order, or disposition of the bankrupt, at the time he became bankrupt, with the consent of the true owner.

Stat. 17 & 18 Vict. c. 36, does not in any degree narrow the application of the doctrine of reputed ownership in bankruptcy.

SPECIAL case stated by consent of the parties and by order of Blackburn, J., without pleadings; under The Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 46.

In the year 1852, Joseph Whitehouse and William Jeffries purchased, from The Galvanized Iron Company, certain land, furnaces, forges, and buildings, with the appurtenances, known as The Phoenix Iron Works, situate at West Bromwich, in the county of Stafford, subject to two mortgages of 3000*l.* and 2657*l.* 16*s.* 3*d.* respectively; and by an indenture of 24th September, 1854, the same were conveyed to the said Joseph Whitehouse and William Jeffries accordingly. On 30th April, 1855, the said Joseph Whitehouse and William Jeffries, who had for some time kept a banking account with the Dudley and West Bromwich Banking Company, were indebted to the banking Company, on the balance of their account, in

the sum of 18,549*l.* 11*s.* 7*d.*, for advances, discounts, and advices of bills and otherwise. In order to secure to the banking Company the *473] amount then due on the *balance, and any further moneys which might thereafter become due to them from the said Joseph Whitehouse and William Jeffries, to an amount not exceeding in the whole 15,000*l.*, the latter agreed to mortgage to the plaintiffs, as trustees for the said banking Company (subject to the said previously existing mortgages), the said Phoenix Iron Works above mentioned, and also the engines, machinery, apparatus, implements, utensils, fixtures, and other articles and things in, upon, or about the said ironworks, and belonging to the said Joseph Whitehouse and William Jeffries. The said Joseph Whitehouse and William Jeffries did accordingly, on 30th April, 1855, execute to the plaintiffs, as such trustees, a deed of mortgage of the said works and property, a copy of which accompanied the case and was to be taken as part of it. A schedule was annexed to the deed, in which was set forth a list of the several engines, whimsies, machinery, apparatus, implements, utensils, appendages, fixtures, and other articles and things, comprised in the said mortgage security. This indenture was afterwards, and within twenty-one days after its execution, duly registered under stat. 17 & 18 Vict. c. 36, entitled "An Act for preventing frauds upon creditors by secret bills of sale of personal chattels," as a mortgage of personal chattels, and all the formalities prescribed by that Act were duly complied with. The plaintiffs never entered into possession of the said works, or of any of the mortgaged premises, and the said Joseph Whitehouse and William Jeffries continued in the actual possession and occupation, and apparently in the ownership of the said works and premises up to and at the times of the filing of their petition for arrangement, and of their being adjudicated bankrupts, as next hereinafter respectively mentioned. On 25th *474] June, 1855, the said Joseph Whitehouse and William *Jeffries filed in the Court of Bankruptcy at Birmingham a petition for arrangement, under the 211th section of The Bankrupt Law Consolidation Act, 1849, and, on 16th August following, they were duly adjudicated bankrupt, under the 223d section of that Act. The defendants were afterwards appointed, and now are, the assignees of their estate and effects. At the times of the filing of the said petition, and of the said adjudication of bankruptcy, respectively, the said Joseph Whitehouse and William Jeffries were still indebted to the said banking Company, on the said account, in a sum exceeding 15,000*l.*, and the said mortgage security of 30th April, 1855, was still in force and unsatisfied; and at the same times, respectively, there were upon the said works, and in the possession and apparently in the ownership of the said Joseph Whitehouse and William Jeffries, certain of the implements, utensils, and other articles specified in the said schedule and comprised in the said mortgage security of 30th April, 1855, all of them being personal chattels and not fixtures. After the said bankruptcy, the plaintiffs, as trustees for the banking Company, claimed the last-mentioned implements, utensils and articles under the said mortgage security. The defendants, who were then in possession, refused to deliver up the same, contending that, under the 125th section of The Bankrupt Law Consolidation Act, 1849, the Court of Bankruptcy had power to order the same to be sold and dis-

posed of for the benefit of the creditors under the bankruptcy, notwithstanding the registration of the security; and subsequently, and before the sale hereinafter mentioned, the defendants obtained an order from the said Court of Bankruptcy for the sale of the above-mentioned implements, utensils, and articles, for the benefit of the said creditors, as having been in the order and disposition of the bankrupts at the time of the bankruptcy. *This order was obtained ex parte by the assignees, and without notice being given to the other claimants. By agreement between the parties, the said implements, utensils, and articles were sold, and the proceeds, amounting to 1060*l.* 0*s.* 8*d.*, were for the purposes of the case, to be considered as remaining in the hands of the defendants, to abide the decision of this Court upon the question in the case. [*475]

It was admitted that the said mortgage security was made bonâ fide for good consideration, and without notice of any act of bankruptcy by the said Joseph Whitehouse and William Jeffries.

The question for the opinion of the Court was, Whether the registration of the security of 30th April, 1855, took the personal chattels mentioned in the schedule thereto out of the order and disposition of the bankrupts. If this question should be answered in the affirmative, a verdict was to be entered for the plaintiffs for the sum of 1060*l.* 0*s.* 8*d.*; if in the negative, a verdict was to be entered for the defendants.

H. Lloyd, for the plaintiffs.—It is admitted that, but for the registration under The Bills of Sale Act, of the mortgage of 30th April, 1855, the chattels assigned thereby would have remained in the order and disposition of the bankrupts. That registration, however, prevented the chattels from passing to the assignees of the bankrupts under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, s. 125; which enacts that, “if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken *upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy: Provided that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act made in the parliament holden in the 8th and 9th years of the reign of Her Majesty, intituled An Act for the registering of British vessels, or any of the Acts therein mentioned.” The object of this and the similar enactments in the earlier bankrupt Acts was to prevent fictitious credit being obtained by a trader in insolvent circumstances, and to punish the unconscientious conduct of the true owner of goods in enabling such a trader to obtain fictitious credit, by leaving the goods in his apparent ownership: *Belcher v. Bellamy*, 2 Exch. 308.† That case also shows that the question whether goods were left by the true owner in the reputed ownership of a bankrupt at the time of his bankruptcy, is a question of fact, to be determined by looking at all the surrounding circumstances. No doubt, possession by a bankrupt, [*476]

down to his bankruptcy, of goods of which he was once the real owner, is *prima facie* evidence that he continued in possession of them as owner: *Lingard v. Messiter*, 1 B. & C. 308 (E. C. L. R. vol. 8). That was an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner. The plaintiffs proved that the bankrupt had once been the real owner of the *477] goods in question, and that he continued in possession of them *until he committed an act of bankruptcy. It was held that it lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant endeavoured to do so by proving that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff, and that they were conveyed by bill of sale to the creditor, who afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy. That, soon after the bill of sale was executed, the creditor's initials were marked on all the goods. But the Court held that this was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. That case differs from the present, in that, there, the bill of sale was a private transaction, and did not therefore, to use the expression of Bayley, J., in giving judgment (1 B. & C. 313 (E. C. L. R. vol. 8),) make "notorious to the world" that the bankrupt had ceased to be the real owner. That, moreover, is a very vague expression, and is disapproved of by Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 128, 140 (E. C. L. R. vol. 21), where he says, "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that *the plaintiff* knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner." The question in the present case, therefore, is, *478] whether there *were such circumstances of publicity attending the assignment of the chattels by the bankrupts to the plaintiffs, as that parties afterwards dealing with the bankrupts must be presumed to have known of the change of ownership. It is contended that the registration of the mortgage under The Bills of Sale Act gave sufficient publicity to the assignment to raise that presumption. The title of that Act, 17 & 18 Vict. c. 36, is "An Act for preventing frauds upon creditors by secret bills of sale of personal chattels." The preamble recites that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors." It was, therefore, the object of the Act to do away with the mischief of the secrecy of bills of sale. Sect. 1 provides for their registration as a remedy for that mischief; as a means, that is, of giving them publicity. This section does not, it is true, either refer to or impliedly repeal or alter sect. 125 of The Bankrupt Law Con-

solidation Act, 1849. It, however, introduces a new method for making notorious a change in the ownership of personal chattels, namely, by filing the bill of sale, &c., and thereby giving every creditor of the assignor of the chattels the means of knowing that he has assigned them. [COCKBURN, C. J.—Is it the duty of creditors to search the register of bills of sale?] Perhaps it is not; but, at all events, a creditor who assumes, without searching it, that the person with whom he deals is the owner of all the goods in his possession, does so at his *peril. There is no more hardship upon the creditor, in requiring him to make the search, than there is [*479] upon persons who are practically required to look at notices affixed to church doors or published in the London Gazette, in cases where the law provides that constructive notice may be given in that manner. All that is requisite is, that the creditor should know where to search, and this information is afforded him by sect. 3 of the Act. [HILL, J.—Sect. 1 of the Act makes an unregistered bill of sale ineffectual to change the property in chattels remaining “in the possession or apparent possession of the person” who makes the bill of sale. And the definition of “apparent possession” given in sect. 7 shows that actual possession in fact is meant. The scope of sect. 125 of stat. 12 & 13 Vict. c. 106, is much wider; that enactment applying to the “possession, order, or disposition” of goods by a bankrupt.] The effect of the statutes, taken together, is, that after the registration of a bill of sale, executed by him, a man may be the apparent owner of chattels, and yet not, by law, the reputed owner of them.

Hayes, Serjt., contra.—It is admitted that the fact of the registration of a bill of sale is an important element to be taken into consideration in determining whether goods are or are not in the reputed ownership of the assignor, who retains possession of them down to the time of his bankruptcy; but that fact is by no means conclusive against the reputed ownership. It is said, by the other side, that the registration of the bill of sale constitutes such public notice of the change in the ownership of the goods as to prevent the operation of sect. 125 of stat. 12 & 13 Vict. c. 106. But at what time does the *regis- [*480] tration commence to operate as notice? Suppose, for instance, that the bill of sale is registered the day before the bankruptcy occurs; is the registration eo instanti notice to every creditor of the assignor, however distant from London he may reside? [CROMPTON, J.—My brother Wightman says(a) that he feels a difficulty by reason of the mention in stat. 17 & 18 Vict. c. 36, s. 1, of “assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency,” amongst the persons as against whom a bill of sale, if not registered, is to be null and void. This mention of assignees in bankruptcy looks, he thinks, as though the Legislature had in view the reputed ownership clause in The Bankrupt Act, and contemplated that the bill of sale should, if registered, take the goods the subject of the sale out of the operation of that clause.] Stat. 17 & 18 Vict. c. 36, was passed for the further protection of creditors, and mentions assignees in bankruptcy merely because they are the representatives of the creditors under a bankruptcy. The object was, to give the

(a) Wightman, J., had left the Court during the argument.

creditors of a bankrupt, amongst others, further protection than The Bankrupt Act afforded them; not to cut down the rights which they already enjoyed under that Act. Had the Legislature intended, by stat. 17 & 18 Vict. c. 36, to repeal or modify sect. 125 of stat. 12 & 13 Vict. c. 106, they would have done so in express terms; whereas they have carefully abstained from giving to a bill of sale any effect which it would not have had before. It cannot have been the intention to put creditors under the obligation of paying a fee from time to *time to search the registry of bills of sale, on pain of *481] losing the benefit of the doctrine of reputed ownership by omitting the search. The statute in effect enacts, not that the registration of a bill of sale shall be ipso facto notice to every one, but that no one shall have notice of it without paying a fee. If registration is per se notice, there was no necessity for the proviso at the end of stat. 12 & 13 Vict. c. 106, s. 125, excepting registered assignments of ships from its operation. The point at issue was discussed, though not decided, in *Stansfeld v. Cubitt*, 2 De G. & Jo. 222, where Lord Justice Turner expressed a strong opinion that stat. 17 & 18 Vict. c. 36, does not in any degree narrow the application of the doctrine of reputed ownership. The point has been expressly decided in the bankruptcy Courts, in accordance with that opinion, both in England and in Ireland: in England by Commissioner Holroyd, in *Re Daniel, ex parte Ashby*, 25 Law Times 188; and in Ireland on the construction of the analogous Irish Bills of Sale Act, 17 & 18 Vict. c. 55, by Commissioner Macan, in *Re Arthur O'Connor*, 27 Law Times 27. Those decisions, though not binding on this Court, are entitled to its respect; the more so as they were unappealed against.

H. Lloyd was heard in reply.

COCKBURN, C. J.—I am of opinion that our judgment should be for the defendants. Great weight is to be attached to the decisions upon this very question of the learned Bankruptcy Commissioners in England and Ireland. In addition to these, we have a clear and emphatic *482] expression of opinion by Lord Justice Turner; *and although the decision in the case which called forth that opinion did not turn upon the point, that only makes the Lord Justice's opinion the more remarkable, he having gone out of the way to express it. It seems to me that The Bills of Sale Act was intended to give further protection to creditors, either in Bankruptcy or elsewhere; not to throw any additional impediments in their way. When the language of the Act is compared with that of The Bankrupt Act, it is seen that the "apparent possession" mentioned in sect. 1 and defined in sect. 7 of The Bills of Sale Act is not co-extensive with the reputed ownership against which sect. 125 of The Bankrupt Act is directed. The two Acts were not passed eodem intuitu; the latter contains no formal words to alter or affect the former; it has not, therefore, in any way altered or affected the doctrine of reputed ownership.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am of the same opinion. We cannot construe The Bills of Sale Act by putting in affirmative words. All that the Act does is to take away the validity of bills of sale unless its provisions are complied with; it does not give them extra validity. Unless the effect of the act was to do away with the operation of the reputed owner-

ship clause in The Bankrupt Act in all cases where a bill of sale of goods in a bankrupt's possession has been registered, the goods in the present case were clearly in the reputed ownership of the bankrupts. I do not find anything in The Bills of Sale Act to support the contention that such was its effect. The only words in it which raise any doubt are those in *sect. 1, to which my brother Wightman referred,^(a) [*483 where "assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency" are mentioned amongst the persons as against whom an unregistered bill of sale is to be null and void; words which, it may be said, show that the Legislature had in view the doctrine of reputed ownership in bankruptcy, and intended to alter it. I do not think, however, that we should be justified in attributing to the use, perhaps unnecessary, of these words by the Legislature, the effect of altering the provisions of The Bankrupt Act, in the absence of any express enactment of the kind. Nor do I think that the same kind of possession of goods is referred to in the two statutes, the language used in them being very different. Lord Justice Turner appears to me to be correct in the view which he takes, in *Stansfeld v. Cubitt*, 2 De G. & Jo. 222, 226, that the enactment in The Bills of Sale Act, as to the effect of omitting to register a bill of sale, merely enumerates different classes of creditors, classing together "various persons, with some of whom the doctrine of reputed ownership has nothing to do." We have, besides, the decisions of the Bankruptcy Commissioners, which are very strong authorities, though not absolutely binding on us; and which, coming from persons peculiarly learned in bankruptcy law and being unappealed against, are entitled to very great respect. Our judgment must therefore be for the defendants.

HILL, J.—In this case the title of the assignees must prevail. The question stated for our opinion is, whether *the registration of [*484 the security of 30th April, 1855, took the personal chattels mentioned in its schedule out of the order and disposition of the bankrupts. As I understand the contention of the plaintiff's counsel, he relies upon two grounds: first, that the goods were taken out of the possession of the bankrupts by force of The Bills of Sale Act; and, secondly, that the registration of the security was such public notice to creditors of its existence as to prevent the goods from being any longer in the bankrupts' possession as reputed owners. As to the first point, I think that The Bills of Sale Act in no way affects the reputed ownership clause in The Bankrupt Act. The object of The Bills of Sale Act was to provide certain requirements for the registration of bills of sale, non-compliance with which makes those securities void under some circumstances and as against some persons. The statute, however, goes no further, and carefully avoids any reference to The Bankrupt Act. Then, does the mere fact of the registration of a bill of sale per se make the change of real ownership so notorious that the reputed ownership thereby ceases? If it does, the proviso at the end of sect. 125 of The Bankrupt Act, that the section shall not invalidate the transfer or assignment of any ship or any share thereof, made by way of mortgage or assignment duly regis-

(a) See note (a), p. 480.

tered, would be perfectly idle; for the registration of such a security would, according to that view, take it out of the operation of the statute, without any enactment to that effect.

Judgment for the defendants.

*485] ***The QUEEN v. The Inhabitants of ST. ANNE, WESTMINSTER. Jan. 21.**

Notwithstanding stat. 35 G. 3, c. 101, it is necessary, in order to establish that a settlement has been gained by a pauper, under stat. 3 & 4 W. & M. c. 11, s. 6, by being charged with and paying parochial rates, to show an intention to charge him with the rates, on the part of the officers of the parish in which the settlement is alleged to have been gained.

P. was married in 1825. In 1833 his wife left him, and went to live at M. In November, 1841, she became entitled, in possession, to a freehold house in M., which she occupied thenceforth until P. became chargeable as after-mentioned. She was, by her married name, from time to time rated to and paid the poor-rate in M., in respect of this house, on an assessment of upwards of 10*l.* yearly value; being described in the rate-book as both owner and occupier. In June, 1842, P. came to M., and resumed cohabitation with his wife, but left her again in the following October, and never afterwards returned. A poor-rate made in M. before June, 1842, was paid by P.'s wife while he was living with her there. After his departure in October, 1842, the wife continued to be rated and to pay the rates, as before, in M. The parish officers of M. never dealt with or recognised P. as a rate-payer. In January, 1859, P., who till then had been supported by his wife, became chargeable as a pauper lunatic in W.

On a case stated setting out these facts, and giving the Court power to draw inferences of fact: held, that P. had not acquired a settlement in M. under stat. 3 & 4 W. & M. c. 11, s. 6.

At the Warwickshire Quarter Sessions, held on 18th October, 1859, on the hearing of an appeal by the overseers of St. Anne, Westminster, against an order of two justices of Birmingham made in January, 1859, adjudging the settlement of Alfred John Potter, a pauper lunatic, to be in the said parish of St. Anne, and ordering the guardians of the Strand Union to pay certain sums to the respondents, the guardians of the parish of Birmingham, in respect of the said lunatic, the Sessions confirmed the order subject to the following case, stated for the opinion of this Court.

The lunatic pauper, the said A. J. Potter, is about sixty years of age; he is settled in the appellant parish, and the order is properly made, unless the pauper gained a subsequent settlement by rating in the parish of Merthyr Tydvil, by reason of the circumstances *here-
*486] in after set forth. He was married on 26th April, 1825, at the parish church of Merthyr Tydvil, in the county of Glamorgan, to Elizabeth, the lawful daughter of John and Jane Williams, both of that parish. The said John Williams died on 16th
* July, 1810, leaving a widow Jane, a daughter Jane, and the said Elizabeth, now Elizabeth Potter. At the time of his death he was seised in fee of two houses and a field in the said parish of Merthyr Tydvil. The following is an extract from his will.

"I give, devise, and bequeath all my freehold and leasehold property in the parish of Merthyr Tydvil, to the use of W. M., D. M., and T. J., their heirs, executors, and administrators respectively, according to the nature or quality thereof; as to, for, and concerning all my freehold and leasehold property in Merthyr Tydvil, in trust to permit and suffer my wife and two daughters, and their several assigns, to

receive, and take the rents, issues and profits thereof respectively, as tenants in common, for and during the life of my said wife, and from and immediately after her decease, then in trust to my said two daughters, Jane and Elizabeth, their heirs, executors, administrators, and assigns, as tenants in common, according to the nature and quality of the said estates, and as far forth as I am in any way interested therein or entitled thereto respectively."

The said Jane Williams, the widow, died on 4th November, 1841. Immediately after the pauper's marriage, in 1825, the pauper and his wife came to London, and lived there together till about 1833. The pauper's wife then left him, in consequence of his not supporting her. She came to her mother at Merthyr Tydvil, where she has ever since resided, supporting herself by keeping *a school, with the [*487 help of her interest in her father's property since the mother's death. Up to the death of Jane Williams, the mother of the pauper's wife, she (the mother) was the occupier of, and the person rated for the house at Merthyr Tydvil, hereinafter mentioned. From the death of her mother, in 1841, to the present time, the pauper's wife, the said Elizabeth Potter, has occupied and resided in the freehold house in the parish of Merthyr Tydvil, devised by the will of her father, for which she was rated as hereinafter mentioned, with the exception of a period of about three years, from 1852 to 1855; during which she let the same and received the rents and profits, still residing herself in Merthyr. She has let the rest of the freehold property in the said parish, so devised as aforesaid, to tenants, and has received the rents and profits thereof from the death of her mother to the present time. The name of the said Elizabeth Potter first appears in the rate-books of the parish of Merthyr Tydvil, in a poor-rate made on 4th January, 1842, when she was rated in respect of the freehold house so occupied by her as aforesaid, upon an assessment of 14*l.* as the rateable value, as follows.

Party rated.	Owner.
Mrs. Potter.	Herself.

This rate was appealed against, and quashed. In the next rate, made on 14th April, 1842, she was rated in the same way, in respect of the same property, upon an assessment of 11*l.* 10*s.* as the rateable value; and upon this assessment she continued to be rated in every poor-rate, down to November, 1851. There was then a break *in her rating, whilst the property was in the occupation of [*488 her tenant. From September, 1855, after the conclusion of that tenancy, down to the present time, she has continued to be rated in respect of the said property, upon an assessment of 11*l.* 10*s.* as the rateable value. In all the rates, except one, the name inserted is "Mrs. Potter." In a rate made in November, 1851, the name is "Elizabeth Potter." In the owner's column the word "Herself" generally follows the name "Mrs. Potter" in the occupier's column. In other cases, the name in the owner's column is either "Mrs. Potter"

or "Elizabeth Potter." The rates have all been paid by Mrs. Potter when she was the party rated.

At the time of the death of Jane Williams, the widow, the pauper was living away, absent from his wife. About the month of April, 1842, he addressed a letter to her. Some time afterwards, he came and lived for a time in the parish of Merthyr Tydvil, cohabiting with his wife. The periods of that cohabitation cannot be fixed as commencing earlier than 22d June, 1842, nor extending further than 27th October, 1842. On 22d June, 1842, it appears that he signed a warrant of distress on a tenant, and, on 22d October, 1842, he signed an agreement with a new tenant; but he never received any rent, or otherwise interfered. With the above exception, the pauper has continued, since 1833, to reside away from Merthyr and his wife. He was supported out of the rents of the freeholds, or by the earnings of his wife. Shortly after this latter date, he left Merthyr Tydvil, and has not since returned, nor has his wife seen him since. Before the pauper returned to Merthyr Tydvil his wife had paid the said rate of 4th January, 1842, which rate was subsequently quashed. The next *489] rate, of 14th April, 1842, *was paid by her on 24th June, 1842. The other rates were made, on 7th July and 24th October, 1842. The rate of 7th July was paid by Mrs. Potter in the month of October. The pauper was never dealt with or recognised by the officers of Merthyr Tydvil as a rate-payer. Since the departure of the pauper, his wife has regularly paid all the rates to which she was assessed, down to the present time.

The question for the Court was, Whether, under the above circumstances, the pauper gained a settlement by rating, in the parish of Merthyr Tydvil.

It was agreed that the Court should be at liberty to draw inferences of fact.

Macaulay, in support of the order of Sessions.—The pauper did not gain a settlement in Merthyr Tydvil, by rating, within the meaning of stat. 3 & 4 W. & M. c. 11, s. 6, which enacts that "If any person, who shall come to inhabit in any town or parish," "shall be charged with and pay his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published, as is hereby before required." The notice referred to is that relating to the place of abode and number of the family, if any, of a person coming to inhabit in a parish or town; which the statute, by sect. 3, requires the churchwarden or overseer of the poor in the parish or town to publish, after its delivery to him by such person; that section enacting that the forty days' residence intended, by stats. 13 & 14 Car. 2, c. 12, s. 1, and 1 Jac. 2, c. 17, s. 3, to make a settlement, shall be accounted from the publication of the notice. By stat. *490] 35 G. 3, c. 101, s. 4, *no person is to gain a settlement by being charged with and paying his share of the public taxes or levies in any parish into which he shall come, in respect of any tenement not being the yearly of value of 10*l*. In order, therefore, to gain a settlement by rating in any parish, it is necessary, first, that the person who is to gain it should come to inhabit there; secondly, that he should afterwards be charged with and pay his share of the public

taxes or levies there, in respect of a tenement rated at not less than 10*l.* yearly value. Even supposing that it can be said, in the present case, that the pauper came to inhabit in Merthyr Tydvil, and that the payment by his wife of the rates to which she was assessed there was a payment by him, still he was never charged with the rates, and consequently gained no settlement: *Rex v. Sarratt*, Burr. S. C. 73, *Rex v. Bramshaw*, Burr. S. C. 98. It may be conceded that the settlement may be gained, although the pauper's name does not appear in the rate-book as that of the person charged: he must, however, in such a case, be known by the parish officers to be the occupier of the tenement rated. In *Rex v. Painswick*, Burr. S. C. 465, Denison, J., expressed an opinion that rating the house only might be sufficient if the tenant paid; but came to that conclusion on the ground that the facts showed that "the parish could not but know who was the occupier." In the later case of *Rex v. Llangammarch*, 2 T. R. 628, the ground of the determination in *Rex v. Painswick* was stated by Ashurst, J., to have been the notoriety of the occupancy; and it was there held that, where a farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement; it being stated in *the case that the overseer of the [*491] poor knew nothing of the tenant, nor whether he resided on the farm. Again, stat. 3 & 4 W. & M. c. 11, s. 6, is not satisfied, unless the person who has been charged with and has paid parochial taxes has resided in the parish forty days after the charge and payment: *Rex v. Ringstead*, 7 B. & C. 607. The pauper, it is true, resided more than forty days in Merthyr Tydvil, subsequently to 24th June, 1842, on which day his wife paid a rate; but he was not the person charged with that rate. His wife was the only person known to the parish officers as liable to and charged with the rates. It is expressly stated in the case, that the pauper was never dealt with or recognised by them as a rate-payer. That circumstance distinguishes the present case from that of *Rex v. Heckmondwicke*, 2 Dougl. 564, where the pauper was held to have gained a settlement by paying the rates charged on a house during his occupancy, although the name of the former occupier had been continued in the rate-books: the grounds of the decision being, that the parish officers knew that the former occupier was dead; and, that the charge was made upon the pauper, and could be on nobody else. [He was then stopped.]

Wills, contra.—It is contended that the cases cited on the other side are of doubtful authority. With the exception of *Rex v. Ringstead*, they were all decided before the passing of stat. 35 G. 3, c. 101; and in *Rex v. Ringstead* that statute was not referred to. They all turned upon the principle that stat. 3 & 4 W. & M. c. 11, s. 6, made the being charged with and paying parochial *taxes a means of gaining [*492] a settlement alternative to that of delivering to the overseers the notice of residence required by the earlier Acts and by sect. 3 of that Act. Stat. 35 G. 3, c. 101, however, by sect. 3, did away with the delivery and publication of such a notice as a means of gaining a settlement; and further, by sect. 1, enacted that persons, theretofore removable from a parish within forty days after coming to reside in it, should not be removed till they had become actually chargeable to the parish. This Act thus swept away the grounds upon which the

Courts proceeded in the earlier cases in construing stat. 3 & 4 W. & M. c. 11, s. 6; namely, that to satisfy the statute, it was necessary to show notice to the parish of a person coming to inhabit, and an election on their part to charge him. Since the alteration of the law thus effected, it is not essential to consider the time at which the pauper comes to inhabit in a parish, or whether or not the parish authorities know, whilst he is resident in it, that he is liable to the rates; provided that he in fact becomes liable to pay, and does pay them: *Regina v. St. Marylebone*, 15 Q. B. 399 (E. C. L. R. vol. 69). The remarks of Erle, J., in the course of the argument in that case, are in favour of this contention. He says (15 Q. B. 402): "Stat. 3 W. & M. c. 11, in the earlier part, provides for the settlement of a person coming to inhabit, after the parish has had formal notice of his coming and, by not removing him for forty days, has shown that it elects to permit him to stay. Then comes the section in question:" (sect. 6), "and it may be that the motive of the Legislature in making that enactment was, that they thought the act of the parish in electing to treat the

*493] man as a fellow-parishioner was *equivalent to notice that he had come, and that not removing him for forty days was acquiescence." "But there is now no longer power to remove a person not actually chargeable; so that, if the Legislature had that motive, it has ceased to operate." [CROMPTON, J.—The decision in that case turned upon the construction of the St. Marylebone local Act, which expressly rendered an incoming tenant of premises in that parish liable to the payment of the rates, in proportion to the time of his occupation, in like manner as if he had been originally rated.] The ratio decidendi was, that such a tenant was "charged" with the rates, within the meaning of stat. 3 & 4 W. & M. c. 11, s. 6, simply by reason of his being made liable to the payment of them by the local Act [COCKBURN, C. J.—The main question here is, whether rating a wife is equivalent to rating her husband?] The cases show that where property is assessed, the person who pays the rates assessed upon it may gain a settlement, although not rated nominatim. In Viner's Abridgment, tit. *Settlement of the Poor* (K), sect. 1, it is laid down that "rating a poor occupier of a house for his landlord to the king's taxes, is a rating him within the new explanatory Act" (3 & 4 W. & M. c. 11, s. 6), "to make a settlement." "But Pasch. 7 Ann., it was held, that paying of taxes for the landlord will not gain a settlement for the tenant; he must be charged to them as well as pay them upon this statute. The word (charge) has a proper signification, and means such taxes as are chargeable upon the tenant." In sect. 3 of the same title *The Parish of St. Mary le More v. Heavytree in Devon*, 2 Salk. 478, and

*494] other authorities are referred to, as *establishing that a rate for a house, without a rate on the person of the occupier, is sufficient, if paid by the occupier, to make a settlement. That the question whether the parish officers have notice is not the proper test to apply in determining whether a settlement has been gained under stat. 3 & 4 W. & M. c. 11, s. 6, is shown by the decisions as to settlements by hiring and service under sect. 7 of the same Act; which establish, that if a servant, whilst serving under a yearly hiring, sleeps for forty nights in a parish, however casually or clandestinely, he gains a settlement there: *Rex v. Alton*, Burr. S. C. 418, *Rex v. Hedsor*, Cald.

51, *Rex v. St. Peter's*, in Oxford, 1 Str. 524, s. c. 8 Mod. 50. There have been decisions, even under sect. 6, in which a settlement by rating has been held to be gained, though the facts rebutted the presumption of notice to the parish officers that the person held to have gained the settlement was liable; *Rex v. Openshaw*, Burr. S. C. 522, *Regina v. Husthwaite*, 18 Q. B. 447 (E. C. L. R. vol. 83). At all events, the doctrine of notice is no longer applicable since stat. 35 G. 3, c. 101, was passed. The object and scope of that Act are correctly explained in a note to *Rex v. St. Pancras*, 2 B. & C. 122.(a)

COCKBURN, C. J.—I am of opinion that our judgment should be for the respondents. A long series of cases has shown that, in order that a person may acquire a settlement by being charged with and paying parochial rates, there must be an intention on the part of the parish officers to charge him with the payment. I have looked anxiously for some evidence of such an intention *in the pre- [*495 sent case; but I can find none. Whatever construction we might ourselves have been disposed to put upon stat. 3 & 4 W. & M. c. 11, s. 6, we must adhere to the current of authorities, and not change that which has hitherto been supposed to be the true construction. The only case adduced in support of the opposite view is *Regina v. St. Marylebone*, 15 Q. B. 399 (E. C. L. R. vol. 69). But the decision there turned upon the effect of the local Act, which provided that a person coming into the occupation of premises in that parish, after a rate had been made, should be liable for his proportion of the rate, during the time of his occupation, as if he had been originally rated. The Court held that this enactment precluded the parish officers from saying that they had not intended to charge the pauper. Quite independently, therefore, of what ought to be the construction of the Act of William and Mary, the current of authorities is uniform as to what has been the construction actually put upon it.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am of the same opinion. We are bound by the authorities to see whether it was the intention of the parish officers of Merthyr Tydvil to charge the pauper. *Rex v. Llangammarch*, 2 T. R. 628, shows that, although it is unnecessary that the pauper should have been rated by name, in order that the presumption may be raised that the overseers had that intention, still it must be established that the overseers knew that the pauper was the occupier of the rated premises. At one time during the argument I thought that *Regina v. *Hulme*, 4 Q. B. 538 (E. C. L. R. vol. 45), was an [*496 authority the other way. I find however that the counsel who there argued in support of the view which the Court adopted, after stating that it had "been decided repeatedly that the word 'charged' in stat. 3 & 4 W. & M. c. 11, s. 6, is satisfied without the party being named, if the parish has notice of the party really rated," said, "It is not" "necessary here to contend that, if the name of the landlord be expressly inserted, the tenant is assessed: and where no name is inserted, and the tenant is not known by having paid the rate or otherwise, he may not be legally the party rated, as in *Rex v. Llangammarch*, 2 T. R. 628. But here there is no doubt of notoriety by payment." In that case, therefore, the facts rendered it unnecessary to question the earlier decisions. In *Regina v. Husthwaite*, 18 Q. B.

(a) See p. 128, note (a).

447 (E. C. L. R. vol. 88), two questions were raised, the one, whether the pauper's husband had been charged with the rates; the other, whether he had paid them. The Court held that there was sufficient evidence that the pauper's husband was the person charged and that the payment was made on his behalf: but they never thought of saying that it was immaterial whether or not the overseers had knowledge of those facts. The decision turned, in effect, upon the intention of the overseers to charge the pauper's husband. I quite agree that, if such an intention is made out in any case, it is immaterial that the party charged is not rated by name in the rate-book. But it is further suggested that, in *Regina v. St. Marylebone*, 15 Q. B. 339 (E. C. L. R. vol. 69), Erle, J., meant to state that the effect of the more recent statutes has been to sweep away the whole series of authorities on *497] the construction of the Act of William and Mary. I do not *so understand his language. The decision in that case proceeded upon the plain words of the St. Marylebone local Act. Looking at the facts stated in the case before us, I am of opinion that the pauper was not "charged" within the meaning of stat. 3 & 4 W. 4, c. 11, s. 6.

(HILL, J., was absent.)

Order of Sessions confirmed.

NICHOLSON and Others v. RICKETTS and Others. Jan. 24.

Von S. & Co., merchants trading in Buenos Ayres under that title, agreed with defendants, merchants trading in London under the title of R., B. & Co., to carry on joint exchange operations; by which Von S. & Co. were, at Buenos Ayres, to draw bills periodically on defendants, at ninety days' sight, to sell them there, and to invest the proceeds, keeping defendants out of cash advance by periodically remitting to them bills to the same amount on other firms, to be bought by Von S. & Co. These transactions were to be on the footing of a community of profit and loss.

Plaintiffs, another firm of merchants at Buenos Ayres, bought there of Von S. & Co. certain of the bills drawn by the latter, in their own name, on defendants, in the course of these operations. Plaintiffs were induced to buy the bills by the statement of a broker, employed by Von S. & Co. to procure purchasers, that "the bills were all in order, he having seen" defendants' "letter of credit to Von S. & Co., in virtue of which the bills were drawn." Defendants refused to accept these bills on presentation. Von S. & Co. became bankrupts, and plaintiffs proved on the bills against their estate, and recovered forty per cent. of the amount. Plaintiffs also brought this action against defendants. The declaration contained counts on the bills against defendants as drawers; counts for money lent and money had and received, and a count for the breach of a contract by defendants to accept the bills.

On a case stated embodying the above facts, and giving the Court power to draw inferences of fact: held, that plaintiffs had no cause of action against defendants. That defendants were not drawers of the bills, the signature "Von S. & Co." to the bills not including defendants, though the agreement between Von S. & Co. and defendants created a partnership between them. That defendants were not liable for money lent, plaintiffs having made no loan to Von S. & Co.; or for money had and received, plaintiffs not having paid money on a consideration which had wholly failed. That defendants had not contracted with plaintiffs to accept the bills; Von S. & Co. having no authority to make such a contract for defendants, and (per Crompton and Hill, Js.) not having in fact made any such contract, the broker's statement to plaintiffs amounting merely to an expression of belief that the bills would be, not to a contract that they should be, accepted.

THE first count of the declaration was on a bill of exchange, drawn *498] at Buenos Ayres by defendants, *Messrs. Ricketts, Boucher & Co., for 2600*l.*, payable to defendants' order, ninety days

after sight; endorsed by defendants to Fielden, Brothers, and by them to plaintiffs. Averments: that the bill was duly presented for acceptance, was dishonoured, and was protested; of which defendants had due notice. Breach, non-payment.

The third count was similar to the first, on another bill of exchange for 1229*l.* 19*s.* 2*d.*

The fifth count was on another similar bill of exchange for 1170*l.* 0*s.* 10*d.*, but made payable to the order of Messrs. Joseph Green & Co., and by them endorsed to plaintiffs.

The second, fourth, and sixth counts were against defendants as makers of promissory notes similar to and corresponding in amount with the above-mentioned bills of exchange respectively.

The seventh count alleged that, in consideration that plaintiffs, at defendants' request, would purchase from defendants certain bills of exchange, drawn at Buenos Ayres by Messrs. Von Seutter & Co. upon defendants, defendants promised plaintiffs to accept the said bills on presentment to them in London. Averments: that plaintiffs did purchase the said bills from defendants; that the said bills were presented to defendants for acceptance in London; and that defendants refused to accept the same; whereby the said bills were returned to plaintiffs protested, and their value lost, and the price thereof.

The eighth count was for money lent, money had and received, and money due on an account stated.

The pleas to the first, third, and fifth counts traversed the drawing of the bills, their endorsement, and the notice of dishonour. Those to the second, fourth, and sixth counts traversed the making of the notes. Plea to *the seventh count, non assumpsit. To the [*499 eighth count, never indebted.

Issues were joined on the pleas, and afterwards, by consent, and by order of Crompton, J., a case was stated, which, so far as is material, was as follows.

In the Spring of 1857, Edmund Von Seutter was a merchant in Buenos Ayres, carrying on business there under the firm of E. Von Seutter & Co. The defendants were and are merchants in London, and carry on business under the firm of Messrs. Ricketts, Boutcher & Co. The plaintiffs were and are merchants in Buenos Ayres, and carry on business under the firm of Messrs. Nicholson, Green & Co. The plaintiff Mr. John Nicholson also alone carries on the business of a merchant in Liverpool, under the firm of Joseph Green & Co. Messrs. E. Von Seutter & Co., for a considerable time previous to 1857, carried on large transactions in business with the defendants and other houses in England and the Continent. On 31st January, 1857, Von Seutter & Co. addressed a letter to the defendants, from which the following is an extract.

“Buenos Ayres, 31st January, 1857.

“In former letters you stated to be ready to listen to our views on exchange operations. We now beg to expose you a business which may turn out a very profitable one. To draw in April or May, when exchange is very likely to be at 65*s.*, and ounces 360*l.*, from 10,000*l.* to 20,000*l.*, and put the proceeds in the bank, which may pay 8 per cent. interest; actually the bank pays 10 per cent. and covers 15 per cent. This bill, drawn at ninety days' sight, could be renewed every

three months; say, draw the same amount and remit bills for equal sums. In this way you may be only in cash advance for three or four *500] days. This is the only way to get funds at a *favourable rate for the Summer season. Several respectable houses make the same business, and we could exchange our drafts with one or the other of them. You may be assured that we will be cautious."

To this letter the defendants replied as follows.

"London, 27th March, 1857.

"Messrs. Von Seutter & Co., Buenos Ayres.

"Dear Sirs.

"In reply to the various paragraphs contained in your favour dated 31st January last, bearing on the following subjects, and to simplify the present credits, we hereby grant you a blank running credit for the sum of twenty thousand pounds (20,000*l.*) sterling (for all purposes), that is to say, you are at liberty to draw upon us, and we engage to accept the bills so drawn at 90 days' sight, in advance against River Plate produce, whether on joint account between us, or on your own account, or on account of third parties to our consignment in Europe, with permission as usual to draw against documents; it being understood and mutually agreed to, that the bills of lading of the produce shall follow immediately or as soon as possible, within two months at most, after the issue of such bill against invoice. In case you cannot conveniently cover by shipping documents in the course of two packets, you are to keep us out of cash advance, by redrawing and remitting simultaneously within that period, to the extent of such amount uncovered by shipping documents."

"In addition to the above credit we agree to the proposition you submit to us as to joint account exchange operations, in equal shares between us, that is to say, you may draw on us at ninety days' sight for 10,000*l.* or 20,000*l.*, keeping us out of cash advance during the *501] operation, by *remitting and redrawing every second packet after the issue, in the manner described in the preceding on produce accounts. This account subject to interest as therein stated, but free of commission on either side. The account to bear the actualities of its attendant charges and earnings pro and con, and to be finally closed not later than 31st December next. We place implicit faith in your judgment and intimate knowledge as to the solidity of the concerns wherein you employ the funds, the collateral security they give, and as to the undoubted character of the remittances you make to us during the operation throughout."

"We, in reference to the future, would add our leaning to the impression that these credits, if employed mainly in exchange operations, are in their ultimate issue likely to prove more remunerative than if applied to produce, unless a good margin be afforded for reaction in the European markets during the working of the operations. If these meet your views, we shall thank you to ratify same in full detail in extenso at your earliest convenience,

"And remain, Dear Sirs,

"Yours very truly,

"RICKETTS, BOUTCHER & Co."

On 1st June, 1857, Messrs. Von Seutter & Co. wrote to the defendants as follows.

"Buenos Ayres, 1st June, 1857."

"Messrs. Ricketts, Boutcher & Co., London."

"Dear Sirs,

"We are in possession of your favour of 27th March, by which, and in reply to various paragraphs contained in our former private letters, you grant us a blank running credit for the sum of twenty thousand pounds sterling (20,000*l.*), for all purposes, that is to say, that we *are at liberty to draw upon your good selves, and you [*502 engage yourselves to accept to said extent our bills at ninety days in advance to River Plate produce, whether in joint account with your firm or in consignments for our account or account of third parties, all under the following conditions. Besides this credit of 20,000*l.* in blank, you authorize us to draw on your good selves at ninety days for 10,000*l.* to 20,000*l.* for joint account exchange operations, keeping you always out of cash advances during the operation, by remitting and redrawing every second packet. This account subject to interest, as stated, but free of commission on either side." "With respect to the credit for joint account exchange operations, it is understood that such transactions (until we get your authorization to extend them up to 1st March, 1858) are to be finally closed not later than 31st December, 1857. We have answered to all points concerning your letter of 27th March respecting credits, and beg still to state that we think it quite understood that the risks for bills sold on terms here and the risk for remittances in bills is mutual: any ultimate loss arising from such transaction shall be divided in equal shares between your good selves and us.

"Expecting your approval of this latter paragraph,

"We remain, Dear Sirs,

"Yours faithfully,

"E. VON SEUTTER & Co."

Mr. Von Seutter, the principal partner in the firm of E. Von Seutter & Co., wrote a private letter, dated 2d June, from which the following is an extract.

"I am sincerely obliged to you for the new credit. Please rely on my prudence in all transactions. I shall certainly not expose your funds nor mine. With regard *to the exchange transactions, [*503 you should allow me to remit finally in January or February, as I think that on beginning of next year exchange will be higher than on the end of this. At all events I shall act according to circumstances. It would, perhaps, be good also your authorizing me to remit finally the third month instead of the second. It is understood that I would postpone the remittances only in the case I should be certain to remit one month later at a *1s.* higher exchange; should I have negotiated 20,000*l.*, then I would at all events remit the half, say 10,000*l.*, in the second month, and leave for the third, if profitable, only 10,000*l.* This latter 10,000*l.* I would try to negotiate to German houses, which proceedings would have always five to six days, and keep you, therefore, by equal voyages of the steamers, entirely out of cash advance."

To these letters the defendants replied as follows.

"8th August, 1857.

"We reply to your esteemed of 1st June, answering our special

letter dated 27th March. In deference to your wishes, we hereby modify certain portions of the stipulations therein conveyed, and forming basis for conduct of our business relations. These modifications refer to, firstly, joint exchange operations. We hereby authorize you to extend the period, if requisite, for final close of these transactions, to 1st March, 1858. We should prefer our original terms to remain intact; nevertheless, if circumstances should hereafter warrant it, you are at liberty to remit finally the third month instead of the second, it being understood that you would postpone the remittances only in case you should be certain to insure thereby 1s. higher *504] exchange, and that the amount *then afloat, for which remittances to cover would be deferred to the third month, do not exceed 10,000*l.* as maximum. Your suggestions as to negotiating to your compatriots are not tenable. They are too alert in their interests to lose five or six days, and their invariable practice is to have the firsts left for acceptance even before the English takers, notwithstanding the corresponding seconds and thirds being remitted to the Continent. Secondly, It is understood that the risk for bills sold on terms with you, the risk for remittances in bills on this against same, is mutual, as is also the risk of solvency of parties to whom you deposit proceeds of your drafts upon us on interest, provided you take good and ample security against same, not else. In short, all risks accruing from these exchange operations are mutual, and any ultimate loss arising therefrom, save the proviso just stated in reference to money on loan to local parties, shall be divided in equal moieties between your good selves and us. Save and except these said modifications, our several conditions, contained in ours of 27th March last, and ratified by yours of 1st June, remain in full force and inviolate."

The case then set out at length other correspondence between Von Seutter & Co. and the defendants, the nature of which will sufficiently appear from the following extracts.

On 31st July, 1857, Von Seutter & Co. wrote.

"We think now to enter, by next mail, in the following exchange operations. We draw 12,000*l.*" (the letter described the proposed operations, and proceeded.) "If we succeed to do this business, then of course remit you, on 1st November, the same amount of 12,000*l.*, *505] in good *bills, and draw again, and remit you, on 1st January, the capital benefits and interests. Business in commission on both sides, half account."

On 31st August, 1857, they wrote to inform the defendants of their "having entered on a joint account exchange operation, disposing on your good selves for the amount of 12,000*l.*" "This amount will be placed on interest, and we will inform you fully in our next of the employment of said funds." "It is understood that we keep you entirely free from cash advance, remitting and drawing simultaneously on 1st November. Should we be authorized by your next letter to remit only in January, or, say, 1st February, we shall do so if we find it in our interest, but in all cases we shall keep you out of cash advance." "Should we see exchange lower, next mail, which is not to be expected, we shall draw 3000*l.* or 4000*l.* more. All in conformity with your separate credit for exchange operation. Please now take

note of our said drafts, which we recommend to due honour." (Here followed a list of twelve bills, dated 26th August, drawn on the defendants, and amounting to 12,000*l*.)

On 31st October, 1857, they wrote to the defendants.

"Our final remittances will not be made before 1st March, as remitting on 1st January, all our troubles would remain, perhaps, without remuneration. The present packet being the second since our drafts of 12,000*l*. for the joint account exchange speculation, we remit you herewith the equivalent of said drafts in our remittances as follows." (A list of twelve bills on different firms followed: their total amount being 12,034*l*. 18*s*. 4*d*.) "We hope you will be pleased with the selection of our remittances; we can say they are all *tip-top bills." "As you will see by the note at foot we have disposed on your good selves the same amount of 12,034*l*. 18*s*. 4*d*. ninety days, and recommend our bills to due protection." [*506]

The note at foot, headed "our drafts," contained a list of fourteen bills, dated 28th October, drawn on the defendants, and amounting to 12,034*l*. 18*s*. 4*d*. The last three in the list were numbered 746, 735, 736, respectively, and were those sued upon in the 1st, 3d, and 5th counts of the declaration.

On 7th November, 1857, the defendants wrote to Von Seutter & Co.

"London, 7th November, 1857.

"The exchange adventure you have entered into we hope will turn out well. Your 12 drafts dated August 26th, amounting to 12,000*l*., to the order of various parties, have met due honour." "You must act according to your discretion in the final winding up of this adventure. We imagine the tenor of advices by this mail from Europe will render the profit likely to accrue somewhat problematical. You will of course use all caution in lending the funds on your side, and be likewise extremely careful to take only the very first-rate unexceptionable paper."

On 16th December, 1857, the defendants wrote to Von Seutter & Co.

"London, 16th December, 1857.

"We address you by this conveyance, in the hope she will reach you before the packet of the 8th proximo, by which letter we shall reply in full detail to your several letters of 31st October, now in our possession. The main object of the present is to inform you that, with very trifling exceptions, the whole of the bills drawn on *your side" "are now lying under dishonour, owing to the pressure of the times, the ravages and disorganization ruling in monetary matters all throughout Europe. We grieve to learn that, amongst the number, your drafts on this city, Belgium, and France, figure to a very considerable extent." [*507]

"Of 12,034*l*. 18*s*. 4*d*. remitted in your last, the following amounts are notarially noted for non-acceptance." (Here three of the bills, other than those now sued upon, were mentioned.)

"The residue of your said remittances, not specified herein, are accepted, but notwithstanding the high connection of names they bear, so great and universal is the distrust now prevalent, that their conversion into cash would be a matter of considerable difficulty, and

the eventual retirement of some of the number is, as our recent advices will have informed you, highly problematical."

(The letter then referred to the numerous failures of eminent firms in London and elsewhere which had recently occurred, and to others which were expected; and, after reminding Von Seutter & Co. that their accounts with the defendants showed an uncovered balance of exceeding 10,000*l.* sterling. proceeded.) "We are compelled to adopt the to us painful and reluctant course pursued by other houses without exception, of suffering your drafts upon us, dated 28th October, from 707 to 746, both included, to be noted, for non-acceptance, as a measure of self-protection."

"Sincerely do we trust this will reach you in time to prevent your committing yourselves further in the way of bills of exchange, as remittances or otherwise, for in times like these it is impossible to state
*508] what issues will *meet honour on this side; and that you will, on receipt of this intelligence, take prompt measures to draw in your outstanding deposit, the proceeds of drafts in exchange operations, whether with private firms or with banks, and remit to your various European constituents for their uncovered engagements in this respect."

On 31st December, 1857, Von Seutter & Co. wrote to the defendants.

"Buenos Ayres, 31st December, 1857."

"Exchange adventure. This business will not turn out so well as you expect, as at the present state of things we fear exchange will remain low." "It is indeed fortunate you authorized us to postpone remittances for final settlement up to the end of February."

"We remit you herewith" (here followed a list of twelve bills on different firms, amounting, in all, to 14,000*l.*), "of which 12,000*l.* to the credit of the joint Exchange Adventure, and 2000*l.* to the credit of our general account. Against said 12,000*l.* we have disposed on your good selves" (a list of bills drawn on defendants, dated 31st December, and amounting to 12,000*l.*, followed), "which we recommend to due protection to the debit of said Exchange Adventure."

It was admitted that the above letters contained a true account of the manner in which joint exchange operations were carried on between E. Von Seutter & Co. and the defendants; and it was also admitted that the several bills of exchange stated in the said letters to have been remitted by the said E. Von Seutter & Co. to the defendants were in fact so remitted; and that the several bills of exchange stated in the said letters to have been drawn by E. Von Seutter & Co. on the defendants were in fact so drawn; and, in general, the facts

*509] stated in the *above letters were admitted to be correct. Amongst the bills of exchange drawn by the said E. Von Seutter & Co. on the defendants, on account of the said joint exchange operations, were the three bills in respect of which this action was brought, and being the drafts numbered 746, 735, and 736, in E. Von Seutter & Co.'s letter of 31st October, 1857. The first, No 746, being

"Buenos Ayres, 28th October, 1857.

"Ninety days after sight pay this our first of exchange (second and third unpaid) to the order of ourselves, the sum of 2600*l.* sterling, value

received of Messrs. Nicholson, Green & Co.; which place to account as advised." (Signed) "E. VON SEUTTER & Co."

"To Messrs. Ricketts, Boutcher & Co., London."

Endorsed. "Pay Fielden, Brothers & Co., or order."

"E. VON SEUTTER & Co."

"pp. Fielden, Brothers & Co."

"JOHN PICKERSGILL."

The second, No. 785, for 1229*l.* 19*s.* 2*d.*, was precisely similar, and bore the same endorsements.

The third, No. 736, for 1170*l.* 0*s.* 10*d.*, was similar, but drawn payable to the order of Joseph Green & Co., and was endorsed:—

"pp. Joseph Green & Co.,

"THOMAS B. GIBBONS."

The ordinary manner in which merchants at Buenos Ayres purchase and sell exchange on Europe is as follows. A firm about to draw on persons in Europe makes it known generally, through a money-broker, that they have exchange upon Europe to dispose of. Those who are desirous of procuring bills on Europe agree to purchase such an amount of exchange, in pounds sterling, as may suit both parties: the price is expressed by taking *the gold doubloon, or, as it is generally called there, the gold onza or ounce, [*510 as equivalent to a particular number of shillings. The fewer the shillings that are, by the bargains, to be taken as equivalent to a doubloon, the greater is the amount received by the seller of the exchange. This amount is matter of bargain in each case. The amount depends partly upon the current rate of exchange, and partly upon the credit of the intended drawers of the bills. When the bargain has been completed, for the purchase of so much exchange in pounds sterling, at such a price, the purchaser furnishes the seller with the names of those to whose order he wishes the drafts to be made payable, and the amount payable to each. This is regulated entirely by the purchaser, who may, if he likes, have one draft for the whole amount he has engaged, or may have as many drafts as he will, payable to as many different persons as he will, provided the aggregate of the whole amounts to the stipulated sum. Exchange being always purchased for remittance to Europe, the Buenos Ayres purchaser generally names, as the payee or endorsee of the bill, a merchant resident in Europe, so that, in practice, the purchaser of the exchange seldom becomes a party to the bill.

Messrs. E. Von Seutter & Co., in October, 1857, employed Charles Bader, a money-broker of Buenos Ayres, to procure purchasers of their drafts on Europe. Mr. Bader had made, at Buenos Ayres, the following statement on oath, which it was agreed should form part of the case and be admitted to be true. "That, in October, 1857, he proposed to Mr. William Alexander McLean, a partner of the firm of Nicholson, Green & Co., Messrs. Edmund Von Seutter & Co.'s drafts on Ricketts, Boutcher & Co., of London, to the amount of 5000*l.* sterling; to *which drafts the said William Alexander [*511 McLean expressed a dislike, and refused them, but subsequently did take them, on his assuring him that the bills were all in order; he having seen Ricketts, Boutcher & Co.'s letter of credit to E. Von Seutter & Co., in virtue of which the said bills were drawn."

The plaintiffs, accordingly, agreed with the said Charles Bader to purchase E. Von Seutter & Co.'s drafts on the defendants for 5000*l.*; and paid Messrs. E. Von Seutter & Co. for the same, at the rate of 69*s.* 6*d.* per doubloon, being equal to 1438½ doubloons. The three bills of exchange in question were then drawn by the said Messrs. E. Von Seutter & Co., and the two numbered 746 and 735 were to be, at the request of the plaintiffs, endorsed by Messrs. E. Von Seutter & Co. to Messrs. Fielden, Brothers & Co., or their order, and delivered to the plaintiffs, and by them transmitted to the said Messrs. Fielden, Brothers & Co., Liverpool, for the purpose of making a payment to them on account of the plaintiffs' said firm of Nicholson, Green & Co. The draft numbered 736, for 1170*l.* 0*s.* 10*d.*, was, at the request of the plaintiffs, made payable to Messrs. Joseph Green & Co. or order, and was transmitted by the plaintiffs' said firm of Nicholson, Green & Co. to the said firm of Joseph Green & Co. in Liverpool, as their agents to collect the money. All the three bills were duly presented to the defendants for acceptance, on 14th December, 1857, and were all refused acceptance. The said bills were all duly protested for non-acceptance thereof, and returned by the next mail to the plaintiffs' said firm of Nicholson, Green & Co., at Buenos Ayres, who gave due notice of the said bills having been refused acceptance and dishonoured, to Messrs. E. Von Seutter & Co. Messrs. E. Von Seutter & Co. stopped payment. The *three bills were all endorsed *512] to the plaintiffs before the action was commenced, to enable them to sue upon the bills. The plaintiffs had, at Buenos Ayres, as holders of the bills, proved against the estate of E. Von Seutter & Co. for 1438 gold ounces or doubloons and 85 hundredths, being the equivalent of 5000*l.* at 69*s.* 6*d.* per ounce; and had received from them 40 per cent. on that amount, in full of their claim on E. Von Seutter & Co. on the bills; but with reserve of all their remedies against the defendants. In the event of the judgment being in favour of the plaintiffs, it was agreed that the defendants should have credit, in reduction of damages, for 2000*l.*; being the equivalent, at the above rate of exchange, of the sum thus received by the plaintiffs from E. Von Seutter & Co.

The question for the opinion of the Court was. Are the plaintiffs entitled to succeed in this action on all or any of the counts in the declaration; and, if so, are they entitled to recover the amount of the bills of exchange, or the sum of 5000*l.* being the equivalent at the then rate of exchange of the price paid by the plaintiffs at Buenos Ayres for the bills; and are they entitled to recover re-exchange, or damages, and, in addition, interest, either at 5*l.* per cent., or the current rate of interest at Buenos Ayres?

The pleadings were annexed to the case, and were to be made and taken as a part thereof, and were to be amended if the Court should think fit.

The Court was to be at liberty to draw any inferences of fact that a jury might draw.

*513] *Mellish*, for the plaintiffs.(a)—The defendants are *liable upon these bills, as partners with Von Seutter & Co. The correspondence discloses an agreement between the defendants and Von

(a) Friday, January 20th. Before Cockburn, O. J., Wightman, Crompton, and Hill, J.

Seutter & Co. to carry on exchange operations for their joint benefit, which constituted a complete partnership between the two firms. The agreement is to be collected from the letter of 31st January, 1857, from Von Seutter & Co. to the defendants, containing the original proposal; the defendants' letter in reply, of 27th March; Von Seutter & Co.'s answer of 1st June; and the defendants' letter of 8th August, finally settling the terms of the contract. In this last letter the defendants say: "All risks accruing from these exchange operations are mutual, and any ultimate loss arising therefrom" "shall be divided in equal moieties between your good selves and us." The letters further contain a complete agreement between the parties to share profit as well as loss, that is, to become partners, in respect of exchange transactions. The arrangement, stated concisely, was as follows. Von Seutter & Co. were to sell, at Buenos Ayres, sets of bills, to the amount of 20,000*l.*, drawn by them on the defendants, payable ninety days after sight; and were to employ the proceeds for the joint benefit of both firms, by lending them out to banks and traders there; putting the defendants in funds to take up the bills, by remitting to them other bills, to the like amount, to be bought by Von Seutter & Co. The profit or loss upon the transaction would depend of course upon the fluctuations in the rate of exchange between London and Buenos Ayres, the rate of interest allowed by the borrowers of the money at the latter place, and their solvency. The plaintiffs were induced to purchase, at Buenos Ayres, of Von Seutter & Co., three of the bills drawn by that firm *upon the defendants in pursuance of this arrangement. The plaintiffs did this on the [*514 faith of the letter of credit from the defendants to Von Seutter & Co., and Von Seutter & Co. put the defendants in funds by remitting other bills, the proceeds of which the defendants have received for the joint use of themselves and Von Seutter & Co. The defendants have, however, refused to accept the bills so purchased by the plaintiffs. The question is whether, under these circumstances, Von Seutter & Co. having failed, the plaintiffs have any, and if so, what remedy against the defendants. First, the defendants are liable upon the bills, as drawers. Whether or not the defendants intended such a result (and it may be admitted that they probably did not), the effect of their agreement with Von Seutter & Co. was to create a partnership between them; carried on, in Buenos Ayres, in the name of Von Seutter & Co., and, in London, in the name of the defendants; being a partnership, not for an isolated transaction, but for a particular class of business, embracing a series of transactions. It must be conceded that the defendants are not liable on the bills in question, unless the signature "Von Seutter & Co." to them can be taken to mean Von Seutter & Co. and the defendants; but, the bills being drawn for their mutual benefit, that is the legal meaning of the signature. The partnership between the two firms must have some name; and the correspondence shows that "Von Seutter & Co." was adopted as that name, with respect to transactions at Buenos Ayres. In *South Carolina Bank v. Case*, 8 B. & C. 427 (E. C. L. R. vol. 15), bills were, by arrangement with his copartners in England, endorsed in his own name, but on account of *the firm, by a partner in America; [*515 and it was held that this must be considered as an endorse-

ment by the firm. In the present case, as in that, it was understood that the names of the partners resident in England were not to appear on the foreign bills. In *Emly v. Lye*, 15 East 7, the discount of a bill, drawn by one of several partners in his own name, but for partnership purposes, was held to have no remedy against the partnership on the bill; but there the discounter knew all the partners, and, though aware that the money was to be applied for the benefit of the partnership, advanced it solely on the security of the one whose name was on the bill. If the defendants were in fact partners with Von Seutter & Co., there is no objection in point of law to the name "Von Seutter & Co.," when used for the purposes of the partnership, including the defendants, although Von Seutter & Co. also carried on a business independent of the defendants: *Swan v. Steele*, 7 East 210. [CROMPTON, J.—It is clear law that a dormant partner is liable on a bill endorsed in the name of the firm in which he is a partner, provided that the bill is given in respect of a partnership transaction.] A firm consisting of several may carry on business in the name of one, and then the whole firm will be bound by acts done by him as representing the firm. Secondly, even if the defendants cannot be treated as drawers of the bills, they are at all events liable to the plaintiffs on the counts for money had and received, and for money lent, as partners with Von Seutter & Co., who received the money from the plaintiffs for the partnership purposes: *Ex parte Bolitho*, *Buck's Cases in Bankruptcy* 100. *Denton v. Rodie*, 3 Camp. 493, is *516] directly in point to show that the defendants are liable *as for money lent. [COCKBURN, C. J.—There was a direct loan of money by the plaintiffs in that case; not, as here, a purchase of bills.] At any rate the defendants are liable on the count for money had and received, the plaintiffs having advanced their money on a consideration which has failed. [HILL, J.—Can the plaintiffs be entitled to sue for money had and received on the mere non-acceptance of the bills by the defendants? The plaintiffs bought the bills and took the chance of their being accepted. They have availed themselves of their remedy against the drawers.] Lastly, in that view of the case, the defendants are liable, on the 7th count, for the breach of their implied promise to accept the bills arising from the authority which they gave to Von Seutter & Co. to draw upon them.

Bovill, contra.—First, the defendants are not liable on the bills. It may be admitted that the profit and loss of the exchange operations were to be shared between them and Von Seutter & Co. But they neither authorized Von Seutter & Co. to hold them out as partners, nor did Von Seutter & Co. so hold them out to the world. The two firms remained entirely distinct, and each was bound only by its own signature. Persons at Buenos Ayres buying of Von Seutter & Co. bills drawn by them on the defendants in England, would do so in reliance on the responsibility of the drawers, and would take their chance of getting the acceptance of the drawees. In *Siffkin v. Walker*, 2 Camp. 308, a promissory note was given in his own name, but in respect of the joint liability, by one of two persons jointly liable to *517] the *payee; and Lord Ellenborough held that the maker alone could be sued upon the note. The circumstances in *South Carolina Bank v. Case*, 8 B. & C. 427 (E. C. L. R. vol. 15), were ex-

ceptional. There, as between the parties themselves, the partners in England had given actual authority to the partner in America to use his name there as representing the partnership. But for that fact the case would be inconsistent with all the other decisions. The present case is governed by *Emly v. Lye*, 15 East 7, which is a leading authority upon the subject. [HILL, J.—The real question is, whether there is any legal evidence that the defendants authorized Von Seutter & Co. to sign bills for themselves and the defendants in the name of “Von Seutter & Co.” To determine that, Von Seutter & Co.’s letter to the defendants of 31st January, 1857, and the defendants’ answer of 27th March, are the most material parts of the correspondence.] No such evidence is to be found either in those letters or in any other portion of the correspondence. Even if the agreement to share profit and loss made the defendants partners with Von Seutter & Co., quoad the exchange operations, the defendants are not liable on bills drawn by their copartners in their own names. In *Smith v. Craven*, 1 C. & J. 500, 507,† *Bayley, B.*, points out that the ratio decidendi in *South Carolina Bank v. Case*, was that the partner in America had virtually authority from his copartners to pledge the credit of the firm by an endorsement in his own name; and that that portion of the business of the house which was carried on in America was carried on in his name. *Denton v. Rodie*, 3 Camp. 493, which has been cited on the other side as showing that the defendants are liable *on the count for money lent, is in their favour on [*518 the question whether they are liable to be sued upon the bills. Lord Ellenborough, C. J., after saying that the case was distinguishable from *Emly v. Lye*, 15 East 7, on the ground that the transaction was a loan rather than, as in *Emly v. Lye*, a discount, added, “Therefore, although I cannot say” that the firm “are jointly liable on the unaccepted bills, I think they are jointly indebted to the same amount, as for money lent, or money had and received.” [CROMPTON, J.—My doubt is, whether it can be said to have been within the scope of the partnership business for Von Seutter & Co. to bind the defendants in addition to themselves, by their signature to bills: assuming, that is, that the defendants gave them no express authority.] A partner has no implied authority by law to bind his copartners by a signature to a bill, except by a signature in the true style of the partnership: *Kirk v. Blurton*, 9 M. & W. 284.† The defendants never adopted “Von Seutter & Co.” as the style of the partnership. The expressions of Lord Chancellor Eldon, in *Ex parte Bolitho*, *Buck’s Cases in Bankruptcy* 100, 103, are in the defendant’s favour on this part of the case. He says, “I have always understood the law to be, that if I take a bill to a bank and get it discounted but do not put my name to it, I am not liable on the bill, but an action for money had and received will lie against me. The question then is brought to this: whether these partners are liable by reason of the moneys advanced, or by force of their names appearing on the bills; for if money is advanced to A. and B., and the lender takes a bill from one of them only, he cannot maintain an action upon the bill *against the [*519 two.” *Bevan v. Lewis*, 1 Sim. 376, is to the same effect. In *Beckham v. Drake*, 9 M. & W. 79, 92,† Lord Abinger, C. B., points out that in cases of bills of exchange, “by the law merchant, a chose

in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever." *Swan v. Steele*, 7 East 210, is no authority against the defendants; for there the endorsement of the bill, by which the dormant partner was held to be bound, was in the true style of the firm. All the cases show that the defendants cannot be held liable on the bills. Secondly: the defendants are not liable on the counts for money had and received, or for money lent. [*Mellish*, contra, here said that he gave up the count for money lent.] The count for money had and received is equally untenable. No failure of the consideration for the plaintiffs' purchase of the bills has been shown. The bills were sold on the responsibility of Von Seutter & Co. as drawers, and were bought by the plaintiffs on the faith of the vendors' responsibility, and on the chance of obtaining the further security of the defendant's acceptance. [CROMPTON, J.—If Von Seutter & Co., in selling the bills, were guilty of a fraud, the defendants, also, may be responsible for it: but the plaintiffs cannot, under the circumstances, recover for money had and received: according to the decisions in *Clarke v. Dickson*, E. B. & E. 148 (E. C. L. R. vol. 96), 6 C. B. N. S. 453 (E. C. L. R. vol. 95), in this Court and the Court of Common Pleas.] Even in the case of fraud, the plaintiffs could not have sued, unless they had repudiated the whole transaction; fraud making a contract voidable only, and not void. As it is, the plaintiffs, by proving *under Von Seutter & Co.'s bankruptcy, have
*520] elected to affirm their bargain. [HILL, J.—Having got what they bargained for, they cannot sue for money had and received, though the subject-matter of the bargain proves to be worthless: *Lamert v. Heath*, 15 M. & W. 486.†] That is so. Such an action is maintainable only if the thing sold does not answer the description under which it is sold: *Gompertz v. Bartlett*, 2 E. & B. 849 (E. C. L. R. vol. 75). Lastly; the defendants are not liable on the count for not accepting the bills. The defendants made no more than a conditional promise to Von Seutter & Co. to accept the bills in certain events. But, however they may have bound themselves to Von Seutter & Co. to accept the bills, they never came under any engagement to the plaintiffs to do so. Nor did they give Von Seutter & Co. any authority to show their letter of credit to third persons. Bader, the broker, in stating to the plaintiff McLean that he had seen that letter, and that the bills were all in order, did no more than express an opinion that the bills, being drawn in the regular way of business, would probably be accepted. The facts fail to show any contract to accept the bills, express or implied, by the defendants with the plaintiffs.

Mellish, in reply.—As to the liability of the defendants on the bills, the question is, what is the nature and the reason of the liability of a dormant partner on bills drawn in the name of the firm? His liability cannot depend on an express authority to draw the bills given by him to the acting partners: for it is indisputable that, if A.
*521] and B. are in partnership, and the business is *carried on in the name of A., who is the only ostensible person, B. is liable on bills drawn by A. in his own name, if drawing bills is within the ordinary scope of the partnership; even though there may be an ex

press agreement between A. and B. that B. shall not be so liable. *Swan v. Steele*, 7 East 210, is directly in point for the plaintiffs. They do not dispute the authority of *Emly v. Lye*, 15 East 7; but there the creditor, knowing all the members of the partnership, chose to make the advance on the security of one of them. Here, the partnership between the defendants and Von Seutter & Co. was concealed from the world. It was of the essence of the partnership to draw bills; the drawing was not collateral to its general purposes. Whether or not, therefore, the defendants intended to be bound by Von Seutter & Co.'s drafts, they were in fact bound by them, and the case falls within the principle of *South Carolina Bank v. Case*, 8 B. & C. 427 (E. C. L. R. vol. 15). For the purpose of drawing bills, "Von Seutter & Co." was to be the name of the partnership at Buenos Ayres. It is not at all an unusual transaction for a partnership to draw on itself. [COCKBURN, C. J.—That appears to have been done in *South Carolina Bank v. Case*.] It is equally common for a firm trading in two countries to use a different name in each; possibly with a view to the appearance of the bills which it, in the one country, draws upon itself in the other. The present case is not that of a joint liability in an isolated transaction, as in *Siffkin v. Walker*, 2 Camp. 308; where it is doubtful whether any partnership at all existed, and where, at all events, the use of a partnership name was [*522] unnecessary. Here, the argument was for a joint venture in numerous transactions of the same peculiar nature. Every partnership must be limited to some particular object. Could any definition of partnership be given, which would not include a venture of this description? The agreement to share profit and loss clearly made it a partnership; and, if so, *Ex parte Bolitho*, Buck's Cases in Bankruptcy 100, is no authority against the defendants' liability, as dormant partners, on bills drawn in the name of the firm. The observations of Lord Eldon in that case are in point only where the creditor voluntarily, and with notice of the partnership, takes the security of one partner instead of that of the whole firm. Next, as to the defendants' liability on the count for money had and received. No doubt, if a man buys a particular chattel or species of property, and gets that which he bargained for, he cannot sue for money had and received, unless the bargain proves entirely worthless. But where a man pays money in consideration of a contract entered into by the person who receives it, and that person fails to perform the contract, he who has parted with his money may thereupon sue either for the breach of the contract, or for money had and received. Lastly, the defendants are liable on their implied promise to accept the bills. They would clearly have been so liable, had they in terms authorized Von Seutter & Co. to show their letter of credit to the buyers of the bills. Although the defendants gave no express authority of that sort to Von Seutter & Co., the latter, in showing the letter, were acting within the scope of their implied authority as the defendants' partners.

*COCKBURN, C. J.—I am of opinion that our judgment must be for the defendants. The facts of the case may be brought [*523] into a very narrow compass. The defendants, carrying on business as merchants in London, entered into a contract with Von Seutter &

Co., merchants at Buenos Ayres, for the purpose of transacting exchange operations: the substance of which was, that Von Seutter & Co. should periodically draw and sell at Buenos Ayres bills on the defendants, to be accepted by them, and should periodically remit other bills to the defendants to the same amount, to keep the defendants out of cash advance; that the proceeds of these operations should be applied to the common purposes of the two firms, and that there should be a community of profit and loss between them. In the course of these transactions, Von Seutter & Co. drew certain bills on the defendants and sold them to the plaintiffs. These bills the defendants refused to accept, when presented to them in this country for acceptance; and the plaintiffs thereupon brought this action against the defendants, on the ground that the agreement, and the community of profit and loss, constituted the defendants partners with Von Seutter & Co., and so rendered them liable on the drawing of these bills by the latter. Now, without at all trenching on the doctrine that a partnership would be constituted under circumstances such as those stated in the case, or upon the doctrine of the liability of dormant partners, unknown to those who contract with the ostensible partners, I base my judgment on the ground that, under the circumstances of this case, it does not appear that Von Seutter & Co. had any authority, express or implied, to bind the defendants by drawing the bills. In order *524] that one member of a partnership may bind another, by drawing or accepting a bill, he must have authority, either express, or implied by law, so to do. In ordinary cases of commercial partnership there is no need of express authority, the law implying an authority from the fact that the drawing and accepting bills is part of the ordinary course of such a partnership. So again, in partnerships not strictly commercial, if it is obvious from the nature of the partnership, or from the particular purposes to which the bills are to be applied, that the drawing of bills is essential, there, also, the law implies an authority to each partner to draw them. But here, there being no express authority to Von Seutter & Co. to draw so as to bind the defendants, but, on the contrary, an arrangement that the one firm should draw and the other accept, and that each should be bound so far only as their own signature was concerned, it seems to me that no authority can be implied. The existence and the purposes of this partnership were unknown to the world. The principle, therefore, that where a partnership for particular purposes is held out to the world as existing, and it is reasonable to consider that the drawing of bills is incidental to those purposes, one partner has an implied authority to bind the others by drawing bills, is here inapplicable. We have, then, to consider whether Von Seutter & Co. had any express authority from the defendants; and, as I have already said, the circumstances wholly exclude such a supposition. Mr. *Mellish* himself admits that the defendants did not intend to be bound by Von Seutter & Co.'s signature to the bills. Although, then, there was a partnership, and the defendants were in one sense involved in the firm of Von Seutter & Co., Von Seutter & Co. had no authority, express or implied, to draw bills which should be binding on the defendants.

*525] *With regard to the other counts, Mr. *Mellish* abandons that for money lent; and virtually, also, I think, that for money

had and received. It seems to me impossible that the plaintiffs can have both a right of action on the breach of the contract to accept the bills, and also a right to sue for money had and received. The plaintiffs have recovered against the estate of Von Seutter & Co. a considerable portion of the money which they advanced on the bills. I agree that the defendants, having entered into this partnership, and having authorized Von Seutter & Co. to sell bills for the partnership, may be liable for any breach of the contract arising upon such sale; but I do not think that that liability can possibly be enforced by an action for money had and received.

The question remains, whether the count for not accepting the bills can be maintained against the defendants. It may be that there was, as between the defendants and Von Seutter & Co., an absolute agreement by the defendants to accept the bills on presentation; or it may be, as Mr. *Bovill* puts it, that there was only a conditional agreement to accept under certain circumstances. This, however, it is unnecessary to decide. It is clear that the only authority given by the defendants to Von Seutter & Co. was to sell bills in the ordinary way; and that the defendants, however they may have become liable to them by refusing to accept, never empowered them to pledge the defendants to the obligation of accepting, much less to hold out the defendants to the world as having thus empowered them.

(WIGHTMAN, J., was absent.)

CROMPTON, J.—I am entirely of the same opinion. As *to [*526 the counts on the bills, I can see no authority, either express or implied by law, to Von Seutter & Co., to bind the defendants by the signature "Von Seutter & Co." to these bills. It might just as well have been said that they could have bound the defendants by signing as "Von Boutcher & Co."—I agree with Mr. *Mellish*, to a certain extent, that this may be regarded as a partnership transaction; and, were the case not encumbered with the law relative to bills of exchange, it might be that the defendants would be liable on the contract of Von Seutter & Co. with the plaintiffs. But the question which here arises is, are the bills drawn in the name of the defendants? Where A., B., and C. are in partnership and arrange that C. shall draw bills in his own name on A. and B., I think it impossible to say that C.'s signature to such bills binds the others. The bills are drawn in the course of the partnership transactions, but the signature is not intended to be that of the partnership. In the present case, the arrangement was that the separate names of Von Seutter & Co. and of the defendants should be used in the course of the transactions; the one at Buenos Ayres, and the other at London. The bills were not to be drawn or accepted as partnership bills; it is clear that the signatures "Von Seutter & Co." and "Ricketts, Boutcher & Co." were to mean what they imported, and nothing more. Mr. *Mellish* says that this is the case of a dormant partner, who must be taken to be bound by everything done, in the usual course of business, by the firm in which he is a partner. I quite agree that that principle is sound, and applies to bills as to any other transactions. But here I see no facts to show any agreement that the parties were to trade at Buenos Ayres under the name of Von Seutter & Co. *The [*527 names of the two firms were to be used separately, according

to the arrangement between them that the paper to be dealt in should be drawn by the one and accepted by the other. I cannot see how it can be said that the one drew, any more than that the other accepted, for them both; or that the name of the one included the other. My only difficulty arose from the decision in *South Carolina Bank v. Case*, 8 B. & C. 427 (E. C. L. R. vol. 15). But I think that if that case is to be regarded as law it must be on the grounds pointed out by Bayley, B., in *Smith v. Craven*, 1 C. & J. 500, 507.† Rightly or wrongly, the Court there assumed that the facts showed an authority from the partners in England to the partner in America to bind the whole firm by contracts made by him there in his own name; that he was, in fact, a mere branch house, abroad, of the house in this country. In the present case, I can find no authority, express or implied, to Von Seutter & Co. to bind the defendants. The partnership business was to consist in dealing in certain paper; but this paper was to be created by the one house drawing on the other, not as partners, but in their independent capacity.

We have next to consider whether this transaction can be treated as one of money lent by the plaintiffs, or of money had and received by the defendants. The count for money lent has been very properly abandoned; the transaction was not for a mere loan by the plaintiffs, but for the sale of the bills to them. The count for money had and received is equally out of the question; for the consideration for the purchase of the bills did not wholly fail.

*528] As to the remaining point, I thought at first that it *was the best ground that the plaintiffs had to rely upon. I agree with Mr. *Mellish* to this extent, that it was a direct part of the partnership arrangement between the defendants and Von Seutter & Co., that the latter should sell the bills and raise, by the sale, money for the partnership purposes. I should have hesitated in coming to the conclusion which I have done, had it been shown that there had been an actual contract by Von Seutter & Co. with the plaintiffs, in selling the bills, beyond that arising from mercantile custom; or that Von Seutter & Co. had been guilty of any fraud in the transaction; for the defendants might commit fraud by their agents. Fraud is not here alleged, but it is said that Von Seutter & Co. had authority from the defendants to contract, and did contract, that the defendants would accept the bills. There is, however, great difficulty in saying that the facts show any authority from the defendants to Von Seutter & Co. to show third persons the defendants' letter of credit: and it does not appear with certainty whether Bader, the broker, either really saw that letter himself, or had it put into his hands to show to the plaintiffs. But, however that may have been, it seems to me that what passed between Bader and McLean did not in any way amount to a contract that the defendants should accept the bills. It comes simply to this, that, McLean having expressed a dislike to buying the bills, Bader assured him that the transaction was regular, and that there was every probability, judging from the defendants' letter of credit, that the bills which it authorized to be drawn would be accepted in due course; the plaintiffs, meanwhile, having the security of the liability of the drawers. I am of opinion, therefore, that the plain-

tiffs have failed to establish any of the causes of action on which they rely.

*HILL, J.—I am of the same opinion. My learned brothers [*529 have gone so fully into the facts that it is unnecessary for me to add more than a few words. As to the counts upon the bills, it is clear that the defendants are not liable as drawers. The act of drawing and the act of accepting the bills were independent acts, performed, as the facts show, as the separate acts of Von Seutter & Co. and the defendants respectively, not as their joint acts. As a matter of fact, there was no authority to Von Seutter & Co. to designate the defendants, as well as themselves, by their signature, as drawers to the bills; nor had they any implied authority by law to that effect. Then, as to the claim upon the money counts; it was quite clear, as soon as the facts were stated, that the plaintiffs had no cause of action for money lent. As to the count for money had and received, it fails, because the plaintiffs got what they bargained for, namely, the bills; and, after having received 40 per cent. upon the amount from the estate of the drawers, it is too late for them to say that they disaffirm the bargain. As to the contention that the defendants are liable on the count for not accepting the bills, they never bound themselves to accept. The only contract with the plaintiffs was that of Von Seutter & Co., who, by drawing the bills, bound themselves personally that the drawees should accept. The broker, Bader, did no more than state to the plaintiff McLean that the bills were all in order. The plaintiffs' case therefore fails upon every ground.

Judgment for the defendants.

If a bill is drawn by one partner in his own name, and the name or style of the firm is not on the paper, the other partners will not be liable as drawers, even though the purpose of the bill was to raise money for the firm, and the money was so applied: *Holmes v. Burton*, 9 Vt. 252; *Graeff v. Hitchman*, 5 Watts 454; *Logan v. Bond*, 18 Ga. 192; *Hammond v. Aiken*, 3 Rich. Eq. 119.

If a partnership be carried on in the name of one member, the presumption is that a bill signed with that name is the individual bill of the drawer, and the onus is on plaintiff of showing that it was partnership paper: *Bank v. Winship*, 5 Pick. 11; *Bank v. Cox*, 38 Maine 500; *Boyle v. Skinner*, 19

Misso. 82; *U. S. Bank v. Binney*, 5 *Mason* 176; *Buckner v. Lee*, 8 Ga. 285.

It is doubtful whether, in the United States, in the case of a general promise to accept, or a general authority to draw, a specific authority to exhibit the promise or pledge those making it to third parties would be required; and whether the promise to accept does not carry with it such an authority where the bill has been purchased for a consideration on the faith of the promise. See *Howland v. Carson*, 15 *Penna. St. Rep.* 453; *Mercantile Bank v. Cox*, 38 *Maine* 500; *Steman v. Harrison*, 42 *Penna. St. Rep.* 49, and notes to *Payson v. Coolidge*, 2 *Am. Lead. Ca.* 274.

***530] *The QUEEN v. The Inhabitants of LLANLLECHID.**
Jan. 25.

By stat. 35 G. 3, c. 101, s. 2, "in case any poor person shall" "be brought before any" "justices" "for the purpose of being removed from" his place of sojourn "by virtue of any order of removal," "and it shall appear to the said" "justices that such poor person is unable to travel, by reason of sickness or other infirmity," "the" "justices making such order of removal" are required and authorized to suspend the execution of the same, until satisfied that it can be executed without danger to the person to be removed; and the suspension is to be endorsed on the order of removal.

Held, dissentiente Wightman, J., that under this statute the suspension of the execution of an order of removal of a pauper can only be made by the justices at the same time as the order of removal itself; the justices being, after that time, *functi officio*.

ON an appeal to the Carnarvonshire Quarter Sessions against an order of two justices for that county, made on 2d November, 1858, for the payment of charges and expenses incurred by the respondent parish of Llanllechid, under a suspended order of removal of Jane Jones from the parish of Llanllechid to the appellant parish of Pistyll, the Sessions quashed the said order, subject to the opinion of this Court upon the following case.

On 28th September, 1849, an order of the Reverends Hugh Price and James Vincent Vincent, two justices of the peace for the county of Carnarvon, was obtained for the removal of Jane Jones from the parish of Llanllechid to the parish of Pistyll, both in the county of Carnarvon. On 26th October, 1849, the said order was suspended by the same justices. On 24th May, 1858, the pauper died, and, on 2d November, 1858, the order for suspension was removed by an order of two justices of the county of Carnarvon, which directed the payment, by the overseers of the poor of the parish of Pistyll, to the overseers of the poor of the parish of Llanllechid, of the sum of 52*l.* 2*s.* 11*d.*, for the charges and expenses incurred in maintaining the said
***531]** pauper. The overseers *of the poor of the parish of Pistyll paid to the overseers of the poor of the parish of Llanllechid all moneys incurred by them in maintaining the said pauper, from the date of the order of removal to the month of April, 1853; from which time to the date of the pauper's death nothing was paid: the Board of Guardians of the Pwllheli Union, in which the said parish of Pistyll is situate, having at that time made an order that nothing further should be paid in respect of the said pauper until her removal or death.

If the Court should be of opinion that the order of suspension of 26th October, 1849, ought necessarily to have been made on the same day as the order of removal, and was bad because not so made, then the said order appealed against was to stand quashed. If the Court should entertain a contrary opinion, then the said order was to be confirmed.

Beavan, in support of the order of Sessions.—The question is, whether an order, suspending an order of removal, must not, to be valid, be made at the same time as the order of removal. The Sessions were right in holding that it must. The question turns upon the construction of stat. 35 G. 3, c. 101, s. 2, which, after reciting that poor persons are often removed or passed to the place of their settlement during

the time of their sickness, to the great danger of their lives, enacts, for remedy thereof, "That in case any poor person shall henceforth be brought before any justice or justices of the peace, for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order of removal, or of being passed by virtue of any vagrant pass, and it shall appear to the said justice or justices that *such poor person is unable to travel, by reason [*532 of sickness, or other infirmity, or that it would be dangerous for him or her so to do, the justice or justices making such order of removal, or granting such vagrant pass, are hereby required and authorized to suspend the execution of the same until they are satisfied that it may safely be executed, without danger to any person who is the subject thereof; which suspension of, and subsequent permission to execute the same, shall be respectively endorsed on the said order of removal or vagrant pass, and signed by such justice or justices." [COCKBURN, C. J.—Suppose that there is some delay on the part of the parish officers in bringing the pauper before the justices, and that then the pauper falls into the condition contemplated by the statute as affording ground for the suspension of the order of removal, may not the order be then suspended?] Such a case does not seem to be provided for by the statute. [CROMPTON, J.—The matter was much considered in *Rex v. Everdon*, 9 East 101, 105, 106, where the Court certainly appears to have thought that the question of the danger to the pauper, from removal, is part of what the justices have to take into account during the judicial investigation respecting his removal.] The Act requires the suspension of the execution of the order of removal to be by "the justices making such order of removal;" and clearly contemplates that the order shall be made and suspended at one and the same time. Such seems to have been Lord Ellenborough's opinion in *Rex v. Everdon*, where he, in giving judgment, says, "All" "that the Act meant was, not that where any pauper was brought personally, but where his case was *brought [*533 judicially before the magistrates, for the purpose of his removal, that they should have power to suspend the execution of the order of removal, if it appeared to them, that is by due examination of the facts, that from sickness or infirmity of the party the removal could not then safely be made." Although therefore, in the present case, the order was suspended by the same justices who made it, they had no jurisdiction to suspend it a month after it was made. [WIGHTMAN, J.—The statute does not require the endorsement of the suspension to be made on the order at the same time that the order is made.] The later Act, 49 G. 3, c. 124, s. 1, which empowers other justices than those who make the order of removal and suspension under stat. 35 G. 3, c. 101, s. 2, to put an end to the suspension, assumes that the original orders of removal and suspension are both made together.

B. C. Robinson, contra.—Stat. 35 G. 3, c. 101, s. 2, does not in terms require the making of the order of suspension at the same time as that of removal; and it is reasonable to suppose that the Legislature intended to allow the one to be subsequent to the other, provided that the application for the suspension be made to the same justices who ordered the removal. If the pauper falls sick after the making, but before the execution, of an order of removal, there is as good reason

for suspending his removal as there is if he is sick at the time that the order is made. [COCKBURN, C. J.—The Legislature can scarcely have meant that the suspension of the order of removal should be dependent on the presence, at the hearing of the application for suspension, of the same justices who made the order of removal. Had *534] they *contemplated two separate proceedings, they would have empowered any other justices to make the second order.] In *Rex v. Llanwinio*, 4 T. R. 473, it was held that an order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval. Taking that case with that of *Rex v. Everdon*, 9 East 101, which decides that an order of suspension may be made though the pauper be not brought personally before the magistrates, it is clear that an order of removal may be suspended at any subsequent time. Stat. 49 G. 3, c. 124, s. 1, does not affect the question. It merely provides that other justices than those who have suspended an order of removal may take off the suspension; it says nothing as to when an order of removal is to be suspended in the first instance.

COCKBURN, C. J.—I think that the order of Sessions is right, and must be affirmed. It is with regret that I come to that conclusion, for I see that the mischief which was in the contemplation of the Legislature in passing stat. 35 G. 3, c. 101, s. 2, may arise at a period posterior to the making of an order of removal, in consequence of a pauper not being removed contemporaneously with the making of the order. I was therefore very desirous of putting a large construction on the words of the statute; but, on a careful consideration of the language employed, I cannot but see that it contemplates only a sickness or infirmity of the pauper brought under the notice of the justices at the time of their making the order of removal. The recital shows that the mischief sought to be remedied was the removal of *535] poor persons *during the time of their sickness, and the section requires the justices making the order of removal to suspend its execution. [His Lordship read the section.] Had the Legislature contemplated the suspension of a order of removal, after it had been made, by reason of a sickness of the pauper arising subsequently to the order but before its execution, I think that they would have provided by express enactment for the case of such a supervening sickness, and would have enabled other justices, than those who made it, to suspend the order of removal. If we were to hold that the words of the statute include and provide for such a case, we should be straining them in a manner which judicially we ought not to do. It is far better to leave it to the Legislature to remedy the omission, than that we should take its functions upon ourselves.

WIGHTMAN, J.—Upon the best consideration that I can give to this case, I am of opinion that the Sessions came to a wrong decision. It appears that the order of removal was made on 28th September, 1849. It was not then executed, nor was it incumbent on the parish officers to execute it, immediately. Nearly a month afterwards, on 26th October, the order was suspended by the same two justices who made it; and the question is, whether they had power to do this. The answer to that question depends upon the construction to be given to stat. 35 G. 3, c. 101, s. 2. That section commences with a recital

that poor persons are often removed or passed to the place of their settlement during the time of their sickness, to the great danger of their lives; and then enacts, for remedy thereof, as follows: [His Lordship read the section.] Unless these words are so precise that such a case as the *present cannot be brought within a fair and equitable construction of them, it seems to me that this is one [*536 of those cases which come within the mischief which it was the object of the Act to remedy. Then, are the words of that strict and precise nature? First come the words "in case any poor person shall henceforth be brought before any justice or justices, for the purpose" of removal. It has been held, in *Rex v. Everdon*, 9 East 101, that it is not necessary, to satisfy these words, that the pauper should be actually brought in person before the justices. The section then enacts that if "it shall appear to the said justice or justices that such poor person is unable to travel, by reason of sickness or other infirmity," "the justice or justices making" the order of removal, are to suspend its execution till satisfied that it can safely be executed; and the suspension is to be endorsed on the order of removal. It is said that the sickness or infirmity of the pauper must be made appear to the justices at the same time that they are asked to make the order of removal. The words, however, are not so strict as that; and if that is their proper construction it appears only by implication. I could understand such a construction, if it was necessary that an order of removal should be executed immediately it is made; but *Rex v. Llanwinio*, 4 T. R. 473, decides that it is not. The question is, whether, upon a reasonable construction of the enactment, an order of suspension may not be made, and endorsed on one of removal, at any time before its execution, if the same justices who made the original order are satisfied that the pauper is so sick or infirm as to be unable to travel. It seems to me that such a construction would give effect to the obvious *intention of the Legislature, and that the Ses- [*537 sions were wrong in adopting the more strict construction.

CROMPTON, J.—I quite agree that it is very desirable that the jurisdiction of justices to suspend orders of removal should be put upon a different footing: but we must be guided by the words of the statute, and must be careful not to legislate ourselves upon a question which can be properly considered by the Legislature only. I think that the statute contemplates the suspension by the justices of the execution of an order of removal, at the time that the matter is brought before them for the purpose of making the order of removal. It gives the justices power to inquire into the inability of the pauper to travel at that time, by reason of sickness or infirmity: I do not find that it gives them any fresh jurisdiction of that nature after they have made the order of removal, and are thus *functi officio*. The words "in case any poor person shall" "be brought" before the justices for removal, have, by a liberal construction, been held to mean, in case the question of his removal is brought before them; but the words "the justices making such order of removal" seem to me to point to no other time except that at which that order is made, and to preclude us from saying that the justices have any jurisdiction in the matter afterwards. Lord Ellenborough, in *Rex v. Everdon*, 9 East 101, 105, 106, appears to me to have put a judicial construction to this effect

upon the statute; and his view is confirmed by the later Act, 49 G. 3, c. 124, s. 1. We must not allow ourselves to be induced, by the hardship of the particular case, to strain the plain meaning of the statute.

*538] *HILL, J.—I am of the same opinion, for the reasons given by the Lord Chief Justice, which I need not repeat. The words of the statute clearly point to the time when the case is before the justices for the purpose of making an order of removal, as the time at which the execution of that order may be suspended by the justices. This is plain from the expression, “the justice or justices making such order of removal.” I believe the inconvenience of this construction to be great, but it is the function of the Court to construe the statute by its plain meaning. Order of Sessions confirmed.

The QUEEN v. The Inhabitants of AYLESFORD. Jan. 25.

The exemption of tenants in ancient demesne from parliamentary taxes and tallages is limited to taxes granted by Parliament to the Crown, and does not extend to local taxation levied, under the authority of an Act of Parliament, upon and for the benefit of particular portions of the community.

Tenants in ancient demesne are not therefore, as such, exempt from payment of county rates.

At the General Quarter Sessions for the county of Kent, held on 25th June, 1857, a county rate was made, and therein the parish of Aylesford, in the said county, was assessed in the sum of 19*l.* 8*s.* 9*d.*, and also in the further sum of 29*l.* 3*s.* 1½*d.*, for the purposes of the county constabulary; such assessments being made upon the basis or standard established under stat. 15 & 16 Vict. c. 81, s. 2. Against these two assessments the churchwardens and overseers of the parish of Aylesford appealed to the next General Quarter Sessions, stating as the ground of their appeal “that the said parish of Aylesford is
*539] not, nor are the messuages, lands, and *hereditaments within the said parish, or the owners or occupiers of the same messuages, lands, and hereditaments, in respect thereof, liable to be rated or assessed or charged to or with or in respect of any county rate or police rate, but are wholly exempt; and that the messuages, lands, and hereditaments, situate and being within the said parish of Aylesford, are part of the ancient demesne of the Crown of England, and as such are exempted and discharged from all county and police rates, and from the payment of all county stock whatever.”

The Quarter Sessions confirmed the rate, subject to a case for the opinion of this Court, which was stated, in substance, as follows.

The manor of Aylesford, in the hundred of Larkfield, lies partly within the parish of Aylesford, and partly in parishes adjoining. That portion of the parish of Aylesford which is not comprehended within the manor forms parts of other manors, in like manner as parts of the adjoining parishes are contained within the manor of Aylesford. The manor of Aylesford was part of the ancient demesne of the Crown of England. It is described in Domesday Book as “terra Regis,” and as held by King William, and as of the yearly value of 20*l.* It was granted, by Henry III., to Sir Richard de Grey, and

appears to have been holden of the Crown in capite by members of the de Grey family throughout several reigns. It subsequently became the property of Sir Thomas Wyatt, who died seised of it in capite in the 34th year of Henry VIII. It was forfeited by his son, Sir Thomas Wyatt, in the reign of Queen Mary, who granted it to Sir Robert Southwell and Margaret his wife, to be holden of the Queen and her successors in capite by the service of the fortieth part of one knight's fee. The manor, it is *believed, never reverted to the Crown, but has ever since remained the property of a [*540 subject. The manors of Preston, Tottinton and Eccles or Ayles, or some of them, are also partly in the parish of Aylesford. Tottinton is enumerated in Domesday Book, among the possessions of Odo, Bishop of Bayeux, and appears to have been subsequently granted by King William to a subject by the tenure of knight's service, since which it has always been held by a subject. Eccles also appears in Domesday Book as the property of Odo. This manor was also anciently held by subjects by the tenure of knight's service. The inhabitants of the whole parish of Aylesford, whether tenants of the manor of Aylesford or not, have from time immemorial enjoyed some, at least, of the immunities incident to the tenants of ancient demesne lands. There is no record of their having been summoned to serve, nor of their having served, on juries at the Assizes or Quarter Sessions for the county. They have never paid, or been called upon to pay, county rates (except as hereinafter mentioned), nor have soldiers ever been billeted upon them; but the owners of all lands in the parish have paid land tax and all other parliamentary taxes. The parish of Aylesford was rated to the county rate after the passing of the first county rate Act (12 G. 2, c. 29); and it appears by the county rates entered among the Sessions records that the parish and the borough of Rugmorhill were so rated in the years 1743, 1744, 1745, and 1746; and credit is given in the county treasurer's accounts for the whole amount of the rate. But, although the parish and borough were rated in like manner every year, from 1747 to 1763 the rates were never paid, in consequence whereof the constables of Aylesford and the borough of Rugmorhill were summoned before the *General Quarter Sessions, held on 12th April, 1763, to account [*541 for these rates remaining so unpaid. The inhabitants of Aylesford and the borough of Rugmorhill appeared by counsel and denied their liability, on the ground that the whole parish was ancient demesne of the Crown; and eventually an order of Sessions was made by consent, which, after reciting that the inhabitants of the said parish and town of Aylesford, and of the said borough of Rugmorhill, had appeared in pursuance of such summons, and alleged by their counsel that all the lands, &c., within the said town and parish and borough are part of the ancient demesne of the Crown, and as such are and always have been excepted and discharged from the payment of all county stock whatsoever, other than and except occasional assessments for the repair of county bridges (two of which, namely Aylesford Bridge and Garford Bridge, lie within the said liberty of ancient demesne), ordered that the inhabitants of the said town and parish of Aylesford, and the said borough of Rugmorhill, should thenceforth be rated and pay after the rate of one fourth part of the several re-

spective sums charged and assessed upon other places and parishes within the said county; but, in regard that the county rates had of late been much increased by the embodiment of militia, it was further ordered that, whenever the county militia should thereafter be embodied, the inhabitants of the said town and parish of Aylesford and the said borough of Rugmorhill should pay at and after the rate of one eighth part only of the several and respective sums charged and assessed on other parishes and places in the said county. And it was further ordered, that the said inhabitants of the said town and parish and borough, in consideration of their condescending and submitting to the aforesaid *proportion and allotment, should be *542] exonerated, freed, and discharged of and from all arrears of county rates and assessments therefore made, rated, and assessed. From the making of the above order until the making of the rate now in question, the parish of Aylesford has always been rated to the county rate, according to the said order, at one-fourth of the annual value in proportion to the rating of other parishes, and has duly paid the amounts so charged.

The questions for the Court, which was to have power to draw inferences of fact, were:

1st. Whether, under the circumstances above set forth, the lands, tenements, and hereditaments, parcel of the manor of Aylesford, within the parish of Aylesford, are exempt from liability to the charges for the county and police rate appealed against.

2d. Whether, under the circumstances above stated, the residue of the lands, tenements, and hereditaments in the parish of Aylesford (not parcel of the said manor of Aylesford) are exempt from the aforesaid liability.

The said assessment appealed against was to be confirmed, quashed, or amended, as to the whole parish of Aylesford, or as to so much as was within the manor, or otherwise, according to the decision of the Court.

Montague Smith (*Deedes* with him), in support of the order of Sessions.—All the lands in the parish of Aylesford, whether or not parcel of the manor of Aylesford, are rateable to these rates. Stat. 15 & 16 Vict. c. 81, s. 2, empowers justices at Sessions to appoint a committee “for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared *543] rateably and equally according to *the full and fair annual value of the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor in every parish, township, borough, or place, whether parochial or extra-parochial, within the respective limits of the said justices’ commissions.” This enactment evidently contemplates that all lands which are rateable to the poor-rate shall be rated to the county-rate also. All the lands in Aylesford, without exception, have been always rated to the poor-rate; and the Act of Parliament contains nothing to exempt them from the county-rate. It is said, on the other side, that they are exempt, as being held in ancient demesne. The case, however, finds merely that the manor of Aylesford is part of the ancient demesne of the Crown. Although the manor was held in capite, there is no evidence that the lands in it were held separately in ancient demesne. The

manor, not the parish, is described in Domesday Book as "terra Regis," that is, as ancient demesne. The law as to what lands are ancient demesne is laid down in Com. Dig. tit. *Ancient Demesne* (A), where they are said to be "All lands mentioned in Domesday-Book, to be holden of a manor in the demesnes of Edward the Confessor," "or William the Conqueror." It is added that "land may be ancient demesne, though it be parcel of a manor, which is not ancient demesne." The tenure of the lands, therefore, in a manor, not the tenure of the manor itself, has to be looked at, in order to ascertain whether or not the lands are ancient demesne. In Scriven on Copyhold, vol. 2, p. 582 (ed. 4), it is said "Unless the manor or land is mentioned under the title terræ Regis or terræ Regis Edwardi in Domesday Book, it will not be deemed ancient demesne, although the *book itself should furnish evidence of a grant thereof from the Crown." Assuming, however, that all the lands in Aylesford [*544 are ancient demesne, the tenants of them are not on that account exempt from county rate. [WIGHTMAN, J.—The privilege of tenants in ancient demesne are enumerated in 4 Inst. 269. But, at p. 270, it is said that "regularly all general statutes extend to ancient demesne."] 4 Inst. 270 is cited in Com. Dig. tit. *Ancient Demesne* (K), where it is added that, if lands in ancient demesne "are not named, they shall be subject to a statute, which charges the possession where the land itself is not in demand directly in the King's Court. Hob. 48." (He was then stopped.)

Pickering and *Denman*, contra.—It is assumed, for the purposes of the argument, that the lands in Aylesford are held in ancient demesne. If so, they are not liable to county rates merely because stat. 15 & 16 Vict. c. 81, is general, and does not in terms exempt them. In 4 Inst. 269 six privileges of tenants in land in ancient demesne are mentioned. Of these the fourth is material; where they are said to be free "of taxes and tallages by Parliaments, unless they be specially named." And it is further laid down, that "these privileges remain still, although the manor be come to the hands of subjects." The statement, therefore, which follows at p. 270, that "regularly all general statutes extend to ancient demesne" must be read with reference to the privilege, as far as the statement relates to general statutes which impose taxes. Such statutes do not bind tenants in ancient demesne, unless they specially name them amongst the persons upon whom the taxes are imposed. Otherwise, there would *have been no [*545 necessity to mention tenants in ancient demesne in the land tax Act and many other statutes in which they have been named. [CROMPTON, J.—Lord Coke states the exemption to be from taxes and tallages by Parliaments: by which he must mean such general taxes as are granted by Parliament to the King: not such as are local and levied, like poor-rates, for instance, for local purposes.] Poor-rates come within the category of Parliamentary taxes. They are described as taxation in stat. 48 Eliz. c. 2, s. 1. There is no ground for supposing that Lord Coke meant to state that the privilege is confined to Parliamentary taxes granted to the King. [COCKBURN, C. J.—Did not the privilege arise from the services which tenants in ancient demesne rendered to the Crown; and does it not amount to this, that they are not to be called upon to pay such taxes as are given to

the Crown? Lord Coke, in 4 Inst. 269, assigns as a reason for their privileges, that they "might the better apply themselves to their labours for the profit of the King."] Lord Coke puts no such limitation on the privilege. He does not speak of taxes "granted" by Parliament. The privilege is stated in the same general terms in F. N. B. 14 E. [COCKBURN, C. J.—Do you say that the inhabitants of Aylesford are not liable to pay poor-rates?] If, as may be inferred from the case, they have submitted to pay them, they have done so voluntarily, and for their own convenience. The rates must have been levied by themselves upon themselves, not imposed in invitum. As to stat. 15 & 16 Vict. c. 81, it is the latest of a series of County-Rate Acts, of which stat. 12 G. 2, c. 29, was the first, and by none of which was any new liability to that rate imposed, or non-liability *546] to it affected. The object *of all of them was the same as that of the first, which, as stated by Lord Ellenborough, in *Bates v. Winstanley*, 4 M. & S. 429, 437, "was, not to impose new rates, but to facilitate the assessing, collecting, and levying those that were previously imposed." "There" was "no intention" "to vary the obligation to pay, or the right to receive; the persons before liable to pay, were still to be liable to pay, and the persons entitled to receive, were still to be the persons so entitled."

COCKBURN, C. J.—I am of opinion that the assessment was right, and that the order of Sessions must be confirmed. The county rate is a general impost levied, under an Act of Parliament, for the benefit of each local community, and to which all occupiers of land are to contribute. It is said that the lands in question are exempted from rateability to it by reason of their being held in ancient demesne, and consequently exempt from Parliamentary taxes. In support of this contention two great authorities, Coke and Fitzherbert, are relied upon. But Lord Coke must be understood to mean, by "taxes and tallages by Parliaments," such taxes as were granted by Parliament to the Crown. In his time no one thought of any other taxes than those. It is the business of those who claim an immunity to make it out; we, at all events, are to take care not to extend it beyond what is right. Tenants in ancient demesne originally rendered services of husbandry for the sustenance of the King and his household. Lord Coke enumerates these services, and it is easy to understand how the privilege in question arose in consequence of them. It was reasonable *that, in return for them, the tenants should be exempted *547] from contribution to the taxes imposed on the subject for the benefit of the Crown. But a county rate is an impost distinct from such taxes, being simply a tax imposed by a local community on itself for its own benefit. The argument that tenants in ancient demesne are exempt from such a rate must go the length of affirming that they are also exempt from poor-rate, and, so, free from the obligation to maintain their own poor which is imposed upon all parishes by the statute of Elizabeth. And if they are exempt from poor-rate, there is no reason why the doctrine should not be extended to exempt them from all taxes whatever; a result which would be productive of infinite inconvenience, mischief, and injustice.

WIGHTMAN, J.—I am of the same opinion. It appears to me that a county rate is not a tax or tallage within the meaning of those

words in Lord Coke's statement of the privileges of tenants in ancient demesne. It was but reasonable that such tenants should have many privileges accorded to them, in return for the services which they were bound to render for the Crown's direct benefit. Amongst the privileges which Lord Coke enumerates is an exemption from taxes or tallages by Parliaments. These words would extend to charges levied in respect of lands, if levied for the Crown's direct benefit. But a county rate is not levied for the benefit of the Crown at all, but of the district in which the lands lie which are assessed to it. That the privileges of tenants in ancient demesne are not to be unreasonably extended is shown by the case cited in Comyn,^(a) in which an indictment was *preferred against a man for refusing [*548 to exercise the office of constable, and the question was whether he, being a tenant in ancient demesne, was compellable to accept the office. The Court held that he was. I am clearly of opinion that the order of Sessions must be confirmed.

CROMPTON, J.—I cannot see that the exemption from taxes of tenants in ancient demesne extends further than to taxes in the nature of subsidies to the Crown. Local assessments, such for instance as a highway-rate, or a lighting and watching rate, are not levied to be paid to the Crown, but to be expended for the benefit of the particular part of the community upon which they are imposed. They are not, therefore, taxes within the meaning of the exemption.

HILL, J.—Assuming that tenants in ancient demesne are privileged from the payment of taxes and tallages, local taxation imposed by local authorities for the benefit of a particular district is not a tax or tallage within the meaning of the exemption.

Order of Sessions confirmed.

(a) Anonymous, 1 Vent. 344; cited Com. Dig. tit. *Ancient Demesne*, (F. 1).

*ROUTLEDGE, Appellant, v. HISLOP, Respondent. Jan. 26. [*549

A servant in husbandry having been hired to serve from 1st August, 1858, to Martinmas next ensuing, for the wages of 5*l.*, entered the service, and continued in it till 7th September, 1858, when her master discharged her. Thereupon she sued him in the County Court, claiming damages for the discharge, as having been without reasonable cause. The Judge of the County Court gave a verdict for the master, the defendant in the suit. Afterwards, in May, 1859, the servant took out a summons before justices against the master, to recover the 5*l.* wages.

Held that, the question for decision in the County Court and by the justices being substantially the same, namely, whether the discharge of the servant was without just cause, the justices were bound to treat the decision of the County Court, a Court of concurrent jurisdiction, upon it, as conclusive between the parties; although the form of claim in the summons varied from that made in the County Court.

CASE stated by justices of Leath Ward in the county of Cumberland, under stat. 20 & 21 Vict. c. 43.

The respondent, Mary Hislop, was hired by the appellant, William Routledge, as his servant in husbandry, on 1st August, 1858, to serve from that day till Martinmas next ensuing. In consequence of the said hiring, she entered into his service, and remained in it, as a servant in husbandry, till 7th September, 1858, when he discharged her. She entered a plaint against the appellant, in the County Court

of Penrith, and the following particulars of the plaintiff's demand were delivered.

"In the County Court of Cumberland, holden at Penrith.

"Between *Mary Hislop* . . . Plaintiff,

and

William Routledge . . . Defendant.

"The following are the particulars of the plaintiff's demand referred to in the annexed summons. For that, on 1st August, 1858, the plaintiff was hired and employed by the defendant to serve him in the capacity and employment of a servant in husbandry, from the said 1st August, 1858, until Martinmas next, at and for the wages of 5*l*. That the plaintiff entered upon her said service, and stayed until *550] 7th September, 1858, when she was *discharged from her said service, whereby the plaintiff hath sustained damage to the amount of 6*l*. 4*s*., namely :

"Wages	£5	0	0
"Four Weeks' Board Wages	1	4	0
"Damage to Trunk	0	2	6
	<hr/>		
	£6	6	6"

The case was called on for trial on 11th October, 1858, when defendant's counsel objected to the plaint. The Judge allowed the objection, but gave leave to amend the particulars, and the case stood over till the following Court.

The plaintiff delivered the following amended particulars of demand by leave of the Court.

"The plaintiff claims 6*l*. 6*s*. 6*d*. for damages for breach by the defendant of a contract of hiring made between him and the plaintiff on 1st August, 1858, by discharging the plaintiff from the defendant's service before the termination of the said contract without reasonable cause."

The cause was tried in the County Court, on 10th November, 1858, and the judge, after hearing witnesses for the plaintiff and the defendant, gave a verdict for the defendant.

The appellant was, in May, 1859, served with a summons to appear before the magistrates in Petty Sessions. It recited that "Information hath been made upon oath before one of the justices for the county that you, William Routledge, at Lammas last past, hired or employed one Mary Hislop to be your servant in husbandry, from Lammas last past till Martinmas last past, for the wages of 5*l*. That she entered upon her said service and stayed until 7th September, 1858, when she was discharged from her said service without just cause, but she *551] was always *ready to complete her service; and that you refuse to pay her the wages justly due for the time she was hired, amounting to the sum of 5*l*."

The case was called on for hearing, pursuant to the summons, before the magistrates in Petty Sessions at Penrith, on 10th May, 1859. Both the respondent and the appellant appeared. It was contended by the appellant's counsel, before witnesses were called for either party, that the magistrates had no jurisdiction, as the defendant had been sued in the County Court, holden at Penrith, upon the same

facts; and that the case had been tried and decided between the same parties by the Judge of the said Court on 10th November, 1858. It was also urged that, although the respondent might have caused the appellant to appear before the magistrates in Petty Sessions assembled in the first instance, yet as she had elected to sue him in the County Court, and had gone to trial in that Court, and the case had been decided there, she had thereby disabled herself from seeking redress, subsequently, for the same cause of action in the magistrates' Court. It was contended at the same time, by the respondent's advocate, that she had additional evidence to show that she was improperly discharged, which additional evidence it was not in her power to adduce before the County Court, and that it would amount to a denial of justice if her case could not be reheard. It was also contended, by the respondent's advocate, that damage was sought to be recovered before the County Court for breaking her box, as well as for that her master improperly discharged her; and that the question before the County Court was a divided one, both for the improper discharge and damage to her box; and that, before the magistrates, the respondent sought to *recover the quarter of the year's wages simply, in full, 5*l.*; and that it was not a question of damage at all. The [*552 magistrates, however, notwithstanding the objection raised by the appellant's counsel, proceeded to hear the case, and decided in favour of the respondent, by awarding her 5*l.*, the quarter's wages, for which she was hired; subject to a case for the opinion of the Court, as to whether the magistrates had a right to hear and decide the case between the parties after it had been tried and decided between the same parties in the County Court.

Welsby, for the respondent.(a)—The jurisdiction of the magistrates was not ousted by the proceedings in the County Court. The plaint in that Court was decided upon the respondent's amended particulars; in which she made no claim for wages, but only for damages for a wrongful dismissal. The decision of the County Court Judge was, therefore, that she was not entitled to those damages; and was not at all conclusive against her right to wages. [COCKBURN, C. J.—The question raised in the County Court and before the magistrates was substantially the same; namely, whether or not the respondent was wrongfully discharged.] It is not necessary to deny that it was; but the judgment in the County Court was not that she could not recover wages. [HILL, J.—If *Lord Bagot v. Williams*, 3 B. & C. 285 (E. C. L. R. vol. 10), be law, it appears conclusive against the respondent.] In that case, the cause of action was technically the same in both the Courts in which the action was successively brought. Moreover, the judgment in the first Court was pleaded as an estoppel in the action *in the second. In the present case, the proceedings before [*553 the magistrates were of a different character from those in the County Court, and, had there been pleadings in the magistrates' Court, there could have been no good plea of estoppel. [COCKBURN, C. J.—The proceedings before the magistrates are not so much of a penal character as to decide a dispute as to the amount, if any, due to the respondent.] Although the information may have been in the nature

(a) Saturday, November 10th, 1858. Coram Cockburn, C. J., Wightman and Hill, J.

***557]** ***The QUEEN, on the prosecution of the Churchwardens and Overseers of the Poor of the Parish of THORNBURY, Respondents, WILLIAM MYTTON, Appellant. Jan. 26.**

Under a rate for the relief of the poor of the parish of T., made on 3d May, 1858, appellant was assessed as occupier of an estate in that parish called N. From the year 1698 down to the time the rate was made, N. had maintained its own poor, and had never been charged with the support of the poor of any other place. On 1st April, 1858, P., the owner of a large estate in the parish of T., found, among the title-deeds of that estate in his possession, an agreement dated 12th January, 1698, purporting to be made between the then owner of N. of the one part, and six persons therein named and described as of T., as well on behalf of themselves as of all the rest of the inhabitants of T., of the other. This agreement recited that N. was in the parish of T., and provided that, notwithstanding, N. should thenceforth be in no way liable to maintain or keep, or be at any charges or expenses in maintaining and keeping, any poor in the other part of that parish, but only such poor as should come from N.; and that the other part of the parish should be at the cost of maintaining its own poor, but not the poor from N. The agreement further contained covenants between the parties for carrying out this arrangement. It purported to be executed by the owner of N., party to it, and to be agreed to under hand by two inhabitants of T., other than the parties to it of the second part. On an appeal against the assessment, on the ground that N. was not in the parish of T.: held, that this agreement was admissible in evidence, as being an ancient document relating to the interest of all the estates in T., and which might, therefore, naturally and reasonably be expected to be found among the title-deeds of a large estate in T., and, so, came from the proper custody. That it was decisive evidence to show that N. was a part of T. parish, and how N. came to maintain its own poor; and was also evidence of reputation as to the extent of the parish, being a declaration by the deceased owner of N. and the other inhabitants of T. to that effect.

Stat. 20 Vict. c. 19, s. 1, enacts that, "after 31st December, 1857, every place entered separately in the report of the Registrar-General on the last census" (that of 1851) "which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate" "be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." In the report, "Thornbury with N." was entered as one place, with one number. In a note appended to this entry, it was stated that N. was deemed extra-parochial, and maintained its own poor. Held, that N. was not entered separately in the report, within the meaning of the statute.

Seemle that, had N. been so entered, it must, notwithstanding the other facts in evidence, have been deemed, by virtue of the statute, a parish separate from T., for the purposes of the poor-rate.

THIS was a special case stated by consent, and by order of Erle, J., in substance as follows.

William Mytton, the appellant, is the occupier of a certain house and land in the county of Hereford, which, with some other houses, all being the property of the same owner (William Lacon Childe, Esq.), together form ***558]** an estate called Netherwood, which is bounded on the south and west sides by the parish of Thornbury, but on the east and north by other parishes. From the year 1698 to the present time Netherwood has (except as hereinafter mentioned) maintained its own poor, and has never been charged with the support of the poor of any other place. Of the mode in which the poor of Netherwood were provided for, before 1698, there is no evidence, except as appears by the agreement hereinafter mentioned. Netherwood is liable to county-rates; and in the county-rate assessment for 1819 and down to the year 1839 the following entry occurs, namely:

"Thornbury."

"Ditto; extra-parochial."

Between the years 1819 and 1839 the county-rate precept was di-

rected to the high constable of Broxash; but the county-rate upon Netherwood was collected by the churchwardens and overseers of Thornbury. Since 1839, the county and police rates for Netherwood have always been collected separately for such place, and not as forming part of any parish. (Both parties were to be at liberty to object to the admissibility of this evidence.)

There is no church in Netherwood, and the appellant and other the occupiers of Netherwood have, as of right, sittings in the parish church of Thornbury, and have always been assessed in and paid the church-rates for that parish, and have married, baptized, and buried therein, and are described in the registers of the parish as of Netherwood. The appellant and previous occupier of the Netherwood Estate have served the office of churchwardens of the parish of Thornbury. The said William Lacon Childe is patron of the living of Thornbury, and Netherwood pays a modus in lieu of tithe to the rector *of Thornbury, and is included in the tithe map of the parish; but it was objected, on the part of the appellant, that [*559 the tithe map was not admissible evidence; and if inadmissible this statement was to be struck out of the case. (The case then set out a copy of the Registrar-General's Report on the last census for 1851, relating to Thornbury and Netherwood: in which the column headed "Parish, township, or place" was thus filled up. "Parish. Thornbury with Netherwood." The report set out the number of statute acres, houses, and the population in this parish, and the following note was appended:—"Thornbury includes Westwood and Fencott, which pay church and poor rates to Thornbury, and highway-rates to Hatfield parish. Netherwood, deemed extra-parochial, maintains its own poor, but pays church-rate to Thornbury parish.") In the month of January, 1858, one Sarah Nottingham, whose husband Thomas Nottingham had acquired a settlement at Netherwood by birth, became chargeable, with two children, to the parish of Stoke Bliss. An order of removal of the said paupers to the parish of Thornbury was duly obtained, and on 15th March, 1858, confirmed, on appeal, by the Court of Quarter Sessions for the county of Hereford. The ground of appeal by the said parish of Thornbury was that Netherwood was extra-parochial, and bound to support its own poor. The appellant and the said William Lacon Childe refused, and still do refuse, to support or receive the said paupers at Netherwood; and they are now maintained by the parish of Thornbury. On the part of the appellant, it is contended that the proceedings of the said Court of Quarter Sessions are not evidence against him, and if the Court should so hold the above statement was to be omitted from the case. In *consequence [*560 of the passing of stat. 20 Vict. c. 19, and of the entry in the Registrar-General's report as to Netherwood being reputed extra-parochial, the said William Mytton was, on 29th March, 1858, nominated and appointed under the said statute, by two justices of the peace in and for the county of Hereford, overseer of the poor for the present year, and in such appointment he is described as overseer of the poor of the parish of Netherwood. The appointment was made before the finding of the agreement hereinafter mentioned, and the justices declined to accede to the application of the rector of Thornbury to postpone it.

On or about 1st April, 1858, an agreement, a copy of which was annexed to the case, and was thereby admitted to relate to the Netherwood Estate, and was to form part of the case, subject to any objection which might be raised as to its being admissible in evidence on the present appeal, was found by Evan Pateshall, Esq., of Willfield House, Builth, in the county of Brecon, among the title-deeds of a large estate, of which he is owner, in the parish of Thornbury, and immediately delivered over by him to the Rev. John Williams, the present rector of Thornbury, in whose custody it has since remained. This agreement is dated 12th January, 1698, and expressed to be made between Samuel Pytts, Esq., a former owner of Netherwood Estate, and the then rector and certain parishioners and owners of land in Thornbury. After the finding of the said agreement, the churchwardens and overseers of the poor of the said last-mentioned parish, in an assessment made, on 3d May, 1858, for the relief of the poor of such last-mentioned parish, and for other purposes chargeable thereon, rated the said William Mytton in respect of the said property at Netherwood.

*561] *The agreement referred to in the case was headed as follows. "Articles of agreement, indented, had made, concluded, and agreed upon the 12th day of January," "1698, Between Samuel Pytts, of Kyer Wyer, in the county of Worcester, Esquire, of the one part, and John Stanley, of the parish of Thornbury, in the county of Hereford, clerk, Job Winton, of the said parish; gentleman, Thomas Winton, of the said parish, yeoman, William Good, of the said parish, yeoman, Richard Morris, of the said parish, yeoman, and John Whyttington, of Leominster, in the said county of Hereford, gentleman, as well on the behalves of themselves as on the parts and behalves of all the rest of the inhabitants of the said parish of Thornbury, of the other part."

The agreement itself was as follows.

"Whereas the said Samuel Pytts hath a certain estate called Netherwood, lying and being in the said parish of Thornbury, in the said county of Hereford, late the estate of James Pytts, Esquire, deceased; And whereas there was an agreement formerly made by the said James Pytts, in his lifetime, and the then parishioners of the said parish of Thornbury, that all such poor that should happen at any time after to come and arise and be chargeable to the said parish from the said estate called Netherwood Estate, notwithstanding the said estate doth lie in the said parish of Thornbury, should be no way chargeable to the rest of the inhabitants of the said parish of Thornbury, but that the said estate should maintain and keep the same poor distinctly and apart from the rest of the said inhabitants of the said parish of Thornbury and their estates, and that all the rest of the estates of all the
*562] inhabitants and parishioners of the said *parish of Thornbury should maintain and keep all such poor as should come and arise and be charged or chargeable from any other place or places in the said parish of Thornbury, distinctly from the said estate called Netherwood Estate, and that the same should be no way liable to maintain the same; which said agreement was never reduced into writing; and whereas all the parties aforementioned are now contented and well pleased that the said agreement should be now put into writing and confirmed under their hands and seals, and stand ratified for the

time to come, for the preventing of all disputes that may at any time or times hereafter arise or come touching and concerning all such poor that shall happen at any time or times hereafter to come in and arise in the said parish of Thornbury and be charged on the same; It is agreed by and between all the said parties to these presents that, notwithstanding the said estate called Netherwood is lying and being in the said parish of Thornbury, the same shall be no way liable to maintain and keep or be at any charges or expenses in maintaining and keeping any poor that shall at any time or times hereafter arise, happen, or come in or from any other part of the said parish of Thornbury, but only all such poor as shall at any time or times hereafter happen, arise, or come from the said estate called Netherwood Estate, and that the same shall be distinctly maintained from the rest of the estates of the inhabitants and parishioners of the said parish of Thornbury. And the said Samuel Pytts doth for himself, his heirs and assigns, covenant and grant to and with the said John Stanley, Job Winton, Thomas Winton, William Good, and John Whyttington, and either and every of them, their and either and every of their executors, administrators, and assigns, by these presents, (that is to say) that he, *the said Samuel Pytts, his heirs and assigns, shall [*563 and will at all times hereafter maintain and keep all such poor that shall at any time or times hereafter arise, happen, or come from the said estate called Netherwood Estate distinctly from the rest of the estates of the inhabitants and parishioners of the said parish of Thornbury, and save and keep harmless and indemnified all the rest of the said inhabitants and parishioners of the said parish of Thornbury from all costs, charges, damages, and expenses whatsoever that at any time or times hereafter shall happen, fall out, or come to the other inhabitants and parishioners of the said parish of Thornbury, from all such poor that shall at any time or times hereafter happen, arise, or come to be charged or chargeable from the said estate called Netherwood Estate. And the said John Stanley, Job Winton, Thomas Winton, William Good, and John Whyttington, for themselves severally, and not jointly, nor the one of them for the act of the other, and for their several and respective heirs and assigns, do covenant and grant to and with the said Samuel Pytts, his heirs and assigns, and to and with every of them, by these presents (that is to say), that they, the said John Stanley, Job Winton, Thomas Winton, William Good, and John Whyttington, and either and every of them, their and either and every of their heirs and assigns, and every of them, shall and will at all times hereafter maintain and keep all such poor that shall at any time or times hereafter happen, arise, or come and be legally charged or chargeable on the said parish distinctly from the estate called Netherwood Estate, and save and keep harmless and indemnified the said Samuel Pytts, his heirs and assigns, and every of them, from all costs, charges, damages, and expenses whatsoever that at any time or times hereafter *shall happen, fall, [*564 or come to the said Samuel Pytts, his heirs and assigns, or any of them, from the other part of the said parish of Thornbury, and also, in particular, of and from all costs, charges, damages, and expenses whatsoever, already paid, or which shall hereafter be paid,

for or by reason of one Mary Roberts being lately come to be chargeable to the said parish of Thornbury."

The agreement purported to be executed by Samuel Pytts, but by none of the parties of the second part. Appended to it, however, was the following statement, which purported to be signed by the persons therein named, and to be attested by the same three witnesses who attested Pytts's signature. "We, Richard Rowden, gentleman, and George Baylis, both of the parish of Thornbury within written, do hereby agree to all the articles and clauses within contained. Witness our hands the day and year above written."

The question for the opinion of the Court was, Whether, upon the facts above stated, the said William Mytton was properly included in the said rate made on 3d May. If the Court should answer this question in the affirmative, then the said rate was to be confirmed; and if in the negative, then the said rate was to be amended by striking out the name of William Mytton from it.

Huddleston, for the respondents.(a)—The question is whether Netherwood is in the parish of Thornbury or is extra-parochial. It is clearly within the parish. The case finds that the appellant and other the occupiers of Netherwood have, as of right, sittings in the parish church *565] of Thornbury, and have been always assessed in and paid the church-rates for Thornbury. These are the chief indicia of parochiality, and the mere fact that Netherwood has maintained its own poor cannot outweigh them. The fact is, moreover, explained by the agreement of 12th January, 1698; if that agreement is admissible in evidence. Its admissibility must depend upon whether it comes from the proper custody. The authorities as to what is the proper custody of ancient documents are all collected in Taylor on Evidence, vol. 1, § 595, and the following sections. The language of Tindal, C. J., in the House of Lords, while pronouncing the opinion of the Judges in *Bishop of Meath v. Marquis of Winchester*, 3 B. N. C. 198, 200 (E. C. L. R. vol. 32), is there referred to. His lordship said that "documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit." The agreement in question was found amongst the title-deeds of a large estate in the parish of Thornbury, and in the possession of the owner of that estate. The place and the person were therefore such as to satisfy the test proposed by Tindal, C. J. And if the place and the custody were sufficient and reasonable, it is immaterial whether any other place of deposit would have been better and more proper. [BLACKBURN, J.—*Bullen v. Michel*, 2 Price 399, seems to be in your favour. There, an old chartulary of a dissolved abbey was held admissible, when found in the possession of the owner of part of the abbey lands, *566] though not of *the principal proprietor; and although the strictly proper place of custody for it would have been the Augmentation Office.] That case shows conclusively that the agreement is admissible. And, if admissible, it disposes of the question; for it expressly recites that Netherwood is in the parish of Thornbury.

(a) Wednesday, November 9th. Before Wightman, Hill, and Blackburn, J.

Bovill, contra.—Till April, 1858, when the agreement was found, it had been the universal belief of all persons, for more than a century and a half, that Netherwood was extra-parochial, and maintained its own poor on that account. The payment by the occupiers of Netherwood of church-rates in Thornbury, and their right to seats in the parish church there, are circumstances consistent with the extra-parochiality of Netherwood. The case finds that there was no church in Netherwood; and the right to seats in Thornbury church was, no doubt, conceded to the occupiers of Netherwood on condition of their paying the Thornbury church-rates. The agreement, discovered in 1858, is the only piece of evidence tending to prove that Netherwood is parochial. There are several reasons, however, which show that that document is not admissible. Assuming that the custody from which it comes is proper, it does not purport to be signed by those who were parties to it of the second part, but by two other persons not named in it. But, as no proof is forthcoming that the custodier had any connection with the parties to the instrument, the custody has not been shown to be proper. In *Bullen v. Michel*, 2 Price 399, the chartulary related to all the abbey lands, and, on the division of those lands, could not be kept by all the owners of them; on that account, therefore, the custody of one of those owners was held sufficient. [HILL, J.—If *you are right, the rate which we are [*567 asked to confirm or amend is not only voidable but void. You are asking us to decide, without appeal, on a matter of fact; namely, whether Netherwood is parochial or not. Our decision will not finally settle the question between the parties; for, supposing us to hold that Netherwood is part of the parish, you might still bring an action of trespass if rated wrongly, and distrained upon; and the matter would then be thoroughly tried out.] The parties are willing to treat the judgment of the Court as final. The present case does not fall within *Bullen v. Michel*, the agreement not coming from the custody of any one who is shown to have an interest either in Netherwood or in any of the estates in Thornbury which were owned by the parties to the agreement of the second part. In *Taylor on Evidence*, vol. 1, § 596, it is said, "The Courts have on several occasions refused to admit terriers which have been found among the papers of a mere landholder in the parish, because the legitimate repository for such documents would either be the registry of the bishop, the registry of the archdeacon, or the church chest;" and *Atkins v. Hatton*, 2 Eagle & Y. Tithe Cases 403, is cited. The church chest was the proper repository for this agreement. Lastly, the extract from the report of the Registrar-General on the census for 1851, in which Netherwood is entered separately, and is said to be deemed extra-parochial, is conclusive that Netherwood is now extra-parochial to Thornbury, and is to be deemed a separate parish for the purposes of the poor-rate. By stat. 20 Vict. c. 19, s. 1, it is enacted that, "after 31st December, 1857, every place entered separately in the report of the Registrar-General on the *last census which now is or is reputed to be extra- [*568 parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate" "be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." This enactment in

effect declares all places to be extra-parochial, which had been, before 31st December, 1857, entered separately in the Registrar-General's report on the last census; were reputed to be extra-parochial; and did not pay poor-rate. On 31st December, 1857, Netherwood fulfilled all these conditions. It paid no poor-rate; it was, and, till April, 1858, when the agreement of 1698 was found, continued to be deemed extra-parochial, and the extract from the Registrar-General's report set out in the case, shows that it was entered separately therein. That report was based on the accounts taken by the census enumerators, under stat. 13 & 14 Vict. c. 53, s. 5, and returned to the Registrar-General in pursuance of sect. 7. The Legislature therefore assumed, in stat. 20 Vict. c. 19, that the report was strictly accurate. [HILL, J.—Does stat. 13 & 14 Vict. c. 53, give any appeal from the statements of the enumerators; and, if not, are their statements to be taken as conclusive, notwithstanding they may in fact contain errors?] The statute gives no such appeal; probably the Legislature did not anticipate that the enumerators would make any mistakes.

Huddleston, in reply.—Stat. 20 Vict. c. 19, s. 1, has not the effect, contended for on the other side, of making the separate entry of a place in the Registrar-General's report of the last census conclusive that the place is extra-parochial. But, even if such is the effect of the *statute, Netherwood does not satisfy its requirements, not having been entered separately in the report, but described, in conjunction with Thornbury, thus: "Thornbury with Netherwood." Moreover, sect. 7 of the same statute enacts "that nothing" therein "contained shall apply to any extra-parochial place in respect whereof there shall be any agreement with any parish as to the liability of such place to contribute to the poor-rate of such parish contained in any Act of Parliament." The agreement of 1698 between the owner of Netherwood and the parish of Thornbury brings Netherwood, even if it be extra-parochial, within this exception. [BLACKBURN, J.—Does not sect. 7 refer only to an agreement contained in an Act of Parliament?] It is the liability of the place to contribute to the poor-rate of the parish, not the agreement with the parish, which the section, read rightly, requires to be contained in an Act of Parliament.

Cur. adv. vult.

BLACKBURN, J., now delivered the judgment of the Court.

This was a case stated for the opinion of this Court, to determine the validity of a rate made for the relief of the poor of the parish of Thornbury, in which the appellant was rated as occupier of an estate called Netherwood. The case was argued, in last Term, before my brothers Wightman and Hill and myself. The objection to the rate was on the ground that Netherwood Estate was not properly included in a rate made for the relief of the poor of the parish of Thornbury. Our decision in this case would not have finally determined the real question between the parties, as the appellant might still raise the *570] same point in an action of trespass, contending that the *warrant of distress was without jurisdiction; but, both parties having prayed for our decision on the real point, and consented to be bound by it, we have considered the question carefully.

Two distinct grounds were relied upon by the appellant. First, it was said that Netherwood Estate never was a part of Thornbury

parish, being extra-parochial. The appellant's case, so far, depended on the fact that, for many years past, Netherwood Estate had not contributed to the relief of the poor of Thornbury, and on modern reputation that Netherwood Estate was extra-parochial. There are many facts stated in the case, strongly tending, as evidence, to show that Netherwood Estate is not extra-parochial; but it is unnecessary to inquire on which side the balance of evidence preponderated, as it was scarcely contested by the appellant's counsel that, if the respondents succeeded in accounting by legal evidence for the practice as to the relief of the poor, this part of his case failed. The second ground depended upon the recent Act for the relief of the poor in extra-parochial places, stat. 20 Vict. c. 19. It is convenient to deal with these grounds separately. As to the first objection the case stated that "from the year 1698 to the present time Netherwood has" (with an exception not material for us now to notice) "maintained its own poor, and has never been charged with the support of the poor of any other place. Of the mode in which the poor of Netherwood were provided for before 1698 there is no evidence, except as appears by the agreement hereinafter mentioned." The case afterwards states that "on or about 1st April, 1858, an agreement, a copy of which is hereunto annexed, and is hereby admitted to relate to the Netherwood Estate, and is to form part of this case, subject to any objection [*571] *which may be raised as to its being admissible in evidence on the present appeal, was found by E. Pateshall, Esq., of Willfield House, Builth, in the county of Brecon, among the title-deeds of a large estate of which he is owner in the parish of Thornbury, and immediately delivered over by him to the "present rector of Thornbury, in whose custody it has since remained. This agreement is dated 12th January, 1698, and expressed to be made between Samuel Pytts, Esq., a former owner of Netherwood Estate, and the then rector and certain parishioners and owners of land in Thornbury." One of the principal points argued before us was as to the admissibility of this document in evidence, and our decision on its admissibility will dispose of this part of the case. The document purported to be between Samuel Pytts, of the one part, and six persons, named and described as of Thornbury, "as well on behalf of themselves as on the part and behalf of all the rest of the inhabitants of Thornbury," of the other part; and commences by a recital that Samuel Pytts had an estate called Netherwood, within the parish of Thornbury, late the estate of James Pytts, Esq., deceased; and that there was an agreement formerly made by James Pytts, in his lifetime, and the then parishioners of the parish of Thornbury, that all such poor that should happen at any time after to be chargeable to the said parish from the estate called Netherwood Estate, "notwithstanding the said estate doth lie in the said parish of Thornbury," should be in no way chargeable to the rest of the inhabitants of Thornbury, but that the said estate should maintain and keep the same poor distinctly and apart from the rest of the inhabitants of Thornbury and their estates. And that all the rest of the estates of all the inhabitants and *parishioners of the said parish of Thornbury should maintain [*572] and keep all such poor as should come and arise and be charged or chargeable from any other place or places in the said parish of

Thornbury, distinctly from the said estate called Netherwood Estate, and that the same should be in no way liable to maintain the same; which said agreement was never reduced into writing; and as all the parties were content that the said agreement should be then "put into writing and confirmed under their hands and seals, and stand ratified for the time to come, for the preventing of all disputes that may at any time or times hereafter arise or come, touching and concerning all such poor that shall happen at any time or times hereafter to come in and arise in the said parish of Thornbury, and be charged on the same, it is agreed, by and between" "the" "parties to these presents that, notwithstanding the said estate called Netherwood is lying and being in the said parish of Thornbury, the same shall be no way liable to maintain and keep or be at any charges or expenses in maintaining and keeping any poor that shall at any time or times hereafter arise, happen, or come in or from any other part of the said parish of Thornbury; but only all such poor as shall, at any time or times hereafter, arise, happen, or come in or from the said estate called Netherwood Estate, and that the same shall be distinctly maintained from the rest of the estates of the inhabitants and parishioners of the said parish of Thornbury." The instrument then contained covenants by the parties for carrying out this agreement. It purported to be sealed by Samuel Pytts. It does not purport to be executed by the other parties, but purports to be agreed to, under hand, by two other inhabitants. This instrument, if it is properly proved, is decisive both as *evidence explaining the modern practice as to the relief of the poor, in a manner quite consistent with Netherwood Estate being part of the parish, and as a declaration, by the deceased owner of the Netherwood Estate and the other inhabitants, as to the extent of the parish, that being a matter on which evidence of reputation is admissible. It purports to be an ancient instrument, and is proved if produced from proper custody. It was argued that in the present case there was nothing to show that Mr. Pateshall was owner of any portion of the estates formerly belonging to those who were parties to the deed, though he had a large estate in the parish; but in the language of Tindal, C. J., in delivering the opinion of the Judges in the House of Lords, in *Bishop of Meath v. Marquis of Westminster*, 3 B. N. C. 198, 200 (E. C. L. R. vol. 32), "documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best and most proper place of deposit." We think that such an instrument as this, relating to the interest of all the estates in Thornbury, might naturally and reasonably be expected to be found among the title-deeds of a large estate in that parish. That being so, the first objection fails, as we think it proved that Netherwood Estate was a part of Thornbury parish. The second ground of objection rests on the provision of stat. 20 Vict. c. 19, s. 1, that "after December, 31st, 1857, every place entered separately in the report of the Registrar-General on the last census which now is or is reputed to *be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate, the relief

of the poor, the county, police, or borough rate, the burial of the dead, the removal of nuisances, the registration of Parliamentary and municipal voters, and the registration of births and deaths, be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." It was contended, that, up to the time when the agreement was found by Mr. Pateshall (which was after 31st December, 1857), Netherwood Estate was reputed to be extra-parochial, and that no rate was levied therein for the relief of the poor. An extract of the Registrar-General's report was given in the case, which, it was said, showed that Netherwood Estate was entered separately in the report, and, consequently, it was argued, Netherwood Estate was, since 31st December, 1857, by virtue of this Act, a separate parish for the purposes of the poor-rate. If Netherwood Estate had been separately entered in the report, within the meaning of the Legislature, we are inclined to think that this would have been so. The Census Act, 13 & 14 Vict. c. 53, required the enumerators to return their accounts to the Registrar-General, but did not require the Registrar-General to make any particular use of them. The Registrar-General did, however, digest the information into an elaborate report, which was laid before both Houses of Parliament and printed. The extract from the report, given in the case, does not sufficiently show its nature, and we have considered it our duty to examine the report at large. In this report the Registrar-General has set forth a tabular statement of the population of the United Kingdom. He has, for the convenience of *arrange- [*575 ment, divided the whole kingdom into districts, each of which is designated by a separate name and a separate number. These districts he has again divided into sub-districts, each of which is designated by a separate name and a separate number, and these sub-districts are again sub-divided into "parishes, townships, or places," each of which is designated by a separate name and a separate number, and against each of which is printed the word "parish," "township," "extra-parochial," or "chapelry," as the case may be. On the margin of this report are printed in a smaller type such notes as the Registrar-General has thought fit to add. This report was prepared in this form merely because the Registrar-General thought it the most convenient shape in which to communicate the result of the information acquired in taking the census; and no legal effect resulted from his having done so, nor was it contemplated at the time that his report would affect the rights of any one. But stat. 20 Vict. c. 19, appears to have been framed on the supposition that, where a place was reputed to be extra-parochial, and the repute had been such as to lead the Registrar-General to enter it separately as a place, it would be convenient, for the purpose of quieting titles and avoiding litigation, to make that place extra-parochial, for all secular purposes, in future. There are very many places entered in that report with a separate number as separate places, to which this would apply; but Netherwood is not so entered. "Thornbury with Netherwood" is entered as one place, with one number. There is, it is true, a note appended, showing that the Registrar-General had information before him which might, perhaps, have led him to enter Netherwood separately, if he had been aware that this

*576] would, several years later, become of importance. *Perhaps, if he had known that it was to be important, he would have entered other places jointly, which are now entered separately. We cannot enter into such speculations. We can only say that, on looking at the report referred to in the statute, we are of opinion that Netherwood is not a place entered separately in that report. We think, therefore, that the second objection also fails, and that the rate is good.

Judgment for the respondents.

DOOLY v. THE GREAT NORTHERN RAILWAY COMPANY. Jan. 27.

By reason of stat. 11 Hen. 7, c. 12, and Reg. Gen. Hil. 1853, r. 121, where a plaintiff sues in formâ pauperis, and obtains a verdict and the Judge's certificate for costs, whatever be the amount recovered, nothing is to be allowed on taxation of costs in respect of fees to the plaintiff's counsel, or by way of remuneration for the services of the plaintiff's attorney.

In a case where the Court had previously so held, the Court now refused an application by the plaintiff for a rule to enter a suggestion on the roll to deprive the plaintiff of costs; the object of the application being that error might be brought on the former decision, and the Court holding that error could not be brought.

THE plaintiff, suing in formâ pauperis, had brought an action against the defendants, under Lord Campbell's Act, 9 & 10 Vict. c. 93, as administratrix of her deceased husband, to recover compensation for his death by an accident caused by the defendant's negligence. The action was tried in 1854, before Lord Campbell, C. J., and the plaintiff had a verdict for 150*l.* damages. Lord Campbell certified to give her her costs, under rule 28 of the Pleading Rules of Hil. 1853, whereupon her attorney paid the fees of the counsel who had been retained for her, and included in his bill of costs the amount so paid, and also a claim for remuneration for his own services. On taxation, however, the Master disallowed both these items, considering himself *577] bound to do so by Reg. Gen. Hil., 1853, r. 121; and this Court, *in Michaelmas Term, 1854, discharged a rule obtained by the plaintiff, calling upon the defendants to show cause why the taxation should not be reviewed.(a)

Shee, Serjt., now moved for a rule calling upon the defendants to show cause why a suggestion should not be entered on the roll to deprive the plaintiff of her costs. The object of the application is that the previous decision of the Court may be entered on the roll, so that the plaintiff may bring a writ of error to reverse it. By that decision the Court virtually deprived the plaintiff, because she was a pauper, of the right to costs which she, in common with all successful plaintiffs, has by the statute of Gloucester, 6 Edw. 1, c. 1, s. 2, which enacts "that the demandant may recover against the tenant the costs of his writ purchased, together with" "damages." "And this Act shall hold place in all cases where the party is to recover damages." The previous decision of the Court has, in effect, repealed this enactment, so far as pauper plaintiffs are concerned. The Court relied

(a) Dooly v. Great Northern Railway Company, 4 E. & B. 341 (E. C. L. R. vol. 82).

upon stat. 11 Hen. 7, c. 12, which enacts that such plaintiffs shall have assigned to them "counsel learned," "which shall give their counsels, nothing taking for the same: and likewise" "attorney and attorneys," "and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same;" and also upon Reg. Gen. Hil. 1853, r. 121, which provides that "no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the Masters, or associates, or at the Judge's *Chambers, or elsewhere, by reason of a verdict being [*578 found for such pauper exceeding 5*l*." Neither the statute of Hen. 7, however, nor the new rule, the language of which is not wider, can operate to deprive a plaintiff of the benefit of the Statute of Gloucester, which remains unrepealed and applicable to all successful plaintiffs. The restriction which the Court has put upon that statute, namely, that it entitles a plaintiff only to his costs out of pocket, is opposed to the whole current of previous authority; and the plaintiff ought to be allowed an opportunity of disputing it. [HILL, J.—What form of suggestion do you propose?] The suggestion would run as follows: "And because it is suggested and proved, and manifestly appears to the Court here, that the plaintiff has been duly admitted to sue in formâ pauperis, therefore it appears to the Court, according to the form of the statutes in such case made and provided, that the defendants be acquitted of the said sum of 40*s*. for the costs and charges of the plaintiff as aforesaid, and any further or other costs and charges, except costs out of pocket expended by the plaintiff about her suit in this behalf, and that the defendants go thereof without day." [HILL, J.—The form of the judgment is, that the plaintiff do recover the costs and charges by the plaintiff in and about her suit in this behalf expended. The Master then inquires what these costs and charges are, and finds that they are nil. Such being the facts, what ground is there for an assignment of error? CROMPTON, J.—The principle upon which costs are taxed cannot be made a matter of error.] Proceedings by way of error would properly raise the general question whether the Statute of Gloucester has been affected, as the Court has supposed, by Reg. Gen. Hil. 1853, r. 121. The Common Law *Procedure Act, 1852, contains no provisions to deprive pauper plaintiffs of costs: and the rule in [*579 question is framed for the benefit of such plaintiffs, not by way of immunity to defendants. Rule 28 of the Pleading Rules of Hil. 1853 contemplates that if a person admitted to sue in formâ pauperis obtains a verdict, he shall be entitled, provided he obtains the judge's certificate, to the usual costs from the opposite party. In Gray on Costs, p. 188, it is laid down that "The general rule is, that whenever the Statute of Gloucester, which gives a successful plaintiff his costs of suit, is departed from, some reason for that departure must appear by a suggestion on the record, in order to reconcile the contradiction that would otherwise appear on its face, and also that the other party may have an opportunity of traversing it; but when the alteration sought to be made is merely one which increases or diminishes the amount of the plaintiff's costs, such a course is unnecessary (although in some of the old cases it was held otherwise), for the Master ascertains the

amount on taxation." Where the effect of an Act of Parliament is to alter the law in respect of giving costs to a defendant in a case where the plaintiff in ordinary circumstances would be entitled to them, the proper course is to enter a suggestion on the roll of the facts necessary to entitle the defendant to those costs; so that the plaintiff may demur if the defendant do not set forth the facts which bring the case within the Act of Parliament; or may traverse those facts if they be untrue: *Bartlett v. Pentland*, 1 B. & Ad. 704 (E. C. L. R. vol. 20). [CROMPTON, J.—The Court of error could give no other judgment, here, than that which has been given already; namely, that the plaintiff do recover the costs and charges by her in and about *her suit in that behalf expended.] In *Ricketts v. Noble*, 3 *580] Exch. 521,† the Court directed a suggestion to deprive the plaintiff of his costs under stat. 43 G. 3, c. 46, s. 3, to be entered on the record, in order to enable the parties to raise the question on a writ of error. And although they subsequently^(a) struck out so much of the rule as directed this to be done, they did so with reluctance, and expressed a desire that some regular and formal mode of raising the question on a writ of error should be proposed. [CROMPTON, J.—The question, under that statute, was not one of the amount of costs, but whether the plaintiff was entitled to any costs at all. HILL, J.—Your application is really for an alteration of the judgment, not for a suggestion.]

COCKBURN, C. J.—The form in which the judgment is entered is quite correct. It declares, as the fact is, that the plaintiff is entitled to her costs of suit. We cannot put a suggestion on the record that she is not so entitled. It may be that the law requires amendment; but, if so, it must be done by a fresh enactment and a change of Reg. Gen. Hil. 1853, r. 121.

CROMPTON, J.—I am of the same opinion; and I think that the application should be refused upon principle. The details of the taxation of costs are clearly neither matter of error, nor do they call for our interference. If the Master taxes upon a wrong principle, this Court interferes to set him right but even in such a case there is no ground for bringing error.

HILL, J., concurred.

(BLACKBURN, J., was absent.)

Rule refused.

(a) *Ricketts v. Noble*, 4 Exch. 260.†

*581] *SMITH v. Sir HENRY BROMLEY, Bart. Jan. 28.

Sir HENRY BROMLEY, Bart., v. SMITH (in error).

It is sufficient for the plaintiff, in a writ of error *coram nobis* to reverse outlawry upon final process, to appear in person by the writ to assign error; it is not necessary that he should appear in person at the subsequent stages of the proceedings.

The defendant in error having pleaded a joinder in error to such a writ, by which the plaintiff in error purported to appear in person; held, that defendant had thereby precluded himself from afterwards applying to set aside the proceedings, on the ground that the plaintiff in error had not in fact appeared in person by the writ.

The plaintiff in error coram nobis assigned, as error, that he was beyond seas when the exigent was issued, and the defendant in error pleaded in nullo est erratum to the writ. Held that, the ground assigned as error not being disputed, the plaintiff in error was entitled, as of right, to judgment of reversal of the outlawry: and, he having appeared in person by the writ, the Court, on the prayer of counsel on his behalf, pronounced judgment, reversing the outlawry, and refused to suspend it until he should have satisfied the original judgment debt.

SMITH *v.* Sir HENRY BROMLEY, Bart.

PETERSDORFF, Serjt., in this Term, obtained a rule calling upon the defendant "to show cause why the assignment of errors and all subsequent proceedings in outlawry should not be set aside on the ground that the money recovered by the judgment had not been paid into Court, or any part thereof paid or satisfied, and the defendant not having (sic) rendered himself into custody before or since such assignment, and that he is now out of the jurisdiction of the Court."

It appeared from the affidavits on both sides that, on 21st April, 1855, final judgment was entered up against the defendant for 16,000*l.*, pursuant to a warrant of attorney given by the defendant to the plaintiff to secure payment of an annuity, on which annuity, at the date of the rule, there was due 1757*l.* 5*s.*

On 1st February, 1858, an *exigi facias* was issued, returnable on 23d April, 1858, on which day an **allocatur exigent* was issued, [*582 upon which judgment of outlawry was pronounced against the defendant on 10th June, 1858. The defendant went abroad before 1st February, 1858, and did not return to England until April, 1859. On 29th October, 1859, he sued out a writ of error coram nobis to reverse the outlawry, notice of which was on the same day served on the plaintiff's attorney; and on the same day the defendant assigned as error that he was in parts beyond the seas both when the *exigi facias* and the *allocatur exigent* were issued, and when he was demanded under those writs, and when the judgment of outlawry was pronounced; the defendant concluding with the usual prayer for judgment of reversal. Both in the writ and in the assignment of error it was alleged that the defendant "comes here in person;" but it was sworn by the plaintiff's attorney "that the notice of assignment of error on outlawry, although purporting to be by the defendant in person, was delivered by the attorneys for the defendant, and all the proceedings thereon carried on by them." On 4th November, 1859, the plaintiff delivered a plea of in nullo est erratum, praying judgment of affirmance; and, on 8th November, the error was set down in due course in the special paper for 15th November. On 16th January, 1860, the case of Bromley, Bart., *v.* Smith, in error, not having been then reached, the present rule was obtained, by which it was also ordered that the case in error should be brought on with the rule. The rule had been served on the defendant's attorneys only.

Manisty now appeared to show cause.

Petersdorff, Serjt., for the plaintiff, objected to counsel being heard for the defendant.—The rule calls upon the **defendant* to show [*583 cause, and he must do it in person. In error to reverse outlawry upon final process, the party suggesting error must appear and assign error in person. [CROMPTON, J.—It is stated on the record that the defendant has appeared in person.] The affidavit of the plaintiff's attorney shows that such is not the fact. [CROMPTON, J.—

If you required the defendant to show cause in person, you should have served him, not his attorney, with the rule. We must therefore discharge the rule, if we allow your objection.]

Petersdorff, Serjt., then withdrew his objection, and was called upon by the Court, without hearing *Manisty*, to support the rule.

Petersdorff, Serjt., in support of the rule.—The rule should be made absolute, on the ground that the defendant has not appeared in person to show that he has satisfied the judgment. [CROMPTON, J.—If the defendant has in fact appeared by attorney instead of in person, you have waived the irregularity by joining in error without noticing it.] When the plaintiff joined in error, he had a right to assume that the defendant would appear in Court in person. [COCKBURN, C. J.—We must now take the statement on the record, that the defendant did appear in person, to be true. The proper time for the plaintiff to object that the appearance was not in person, was before joining in error. He ought to have applied to the Court to strike out the allegation of appearance.] The plaintiff now asks the Court to do so.

Per CURIAM.(a) The plaintiff is now too late.

Rule discharged, without costs.

(a) Cockburn, C. J., Wightman and Crompton, Js.

*584] *Sir HENRY BROMLEY, Bart., v. SMITH (in error).

Manisty then, on behalf of the plaintiff in error, prayed the judgment of the Court to reverse the outlawry, the ground of error not being denied by the defendant in error, and entitling the plaintiff in error to a reversal as of right.

Petersdorff, Serjt., for the defendant in error, objected to counsel being heard for the plaintiff in error. When a party appears in person (as it must now be assumed that the plaintiff in error has done) to reverse an outlawry, he must come into Court in person to pray judgment, and show that he has satisfied the judgment in the action. In *Solomon v. Graham*, 5 E. & B. 309 (E. C. L. R. vol. 85), the Court expressed a strong opinion that the outlaw must render himself amenable to justice by appearing in Court and submitting to the conditions of paying the debt and doing what justice requires and the Court thinks fit to be done in the particular case. [WIGHTMAN, J.—Do you say that the outlaw, having once appeared in person, must appear in person at every subsequent stage of the proceedings?] He must do so, in order that the object of the outlawry, namely, the satisfaction of the judgment debt, may be obtained before the outlawry is reversed. Even in the case of impotent persons, whom stat. 7 H. 4, c. 13, allows to appear by attorney to reverse their outlawry, the statute provides “that in the writ of *capias ad satisfaciendum* the common law shall hold place.” [WIGHTMAN, J.—Is there any authority which shows that the outlaw must appear in person at every stage of the proceedings?] There is no express authority; *585] but that he must *necessarily follows from his obligation to satisfy the judgment and to condone his contempt. [WIGHTMAN, J.—It may be that we may withhold our judgment till the out-

law has purged his contempt; but it does not follow that we may not hear him by his counsel.]

Manisty here called the attention of the Court to *Bac. Abr. Outlawry* (G. 1), where it is laid down that "one outlawed" "having once appeared in person, the residue of the proceedings may be by attorney: 2 Keb. 507."

[CROMPTON, J.—That appears to be quite conclusive.]

Manisty then prayed judgment.

Petersdorff asked that the judgment of reversal might be suspended till the plaintiff in error had satisfied the judgment debt.

[CROMPTON, J.—It is laid down in *Lush's Practice*, ed. 2, by Stephen, pp. 580, 581, that judgment of outlawry is reversible as of right on error brought, if, as was the case here, the defendant was out of the jurisdiction when the exigent issued; and that it is only where it is sought to set aside the outlawry upon motion that terms can be imposed.]

Per CURIAM.(a)—The error in this case is manifest; and, in the absence of any authority that he ought now to be here in person, the plaintiff in error has a right to the judgment of the Court that the outlawry be reversed.

Judgment of outlawry reversed.

(a) See note (a), p. 583.

*Ex parte COOK, in re DYSON. Jan. 30.

[*586

Stat. 1 & 2 Vict. c. 110, s. 92, directs that it shall be lawful for the Insolvent Debtors' Court, if there be a surplus after the satisfaction of all an insolvent's debts, to make an order vesting such surplus in the insolvent, or his heirs, executors, administrators, or assigns.(a)

A party applied to the Insolvent Debtors' Court for an order to vest such a surplus in him, under this section; claiming under an alleged assignment to him by the insolvent. That Court, upon inquiry, held that the assignment was invalid as against other claimants of the surplus, and refused to make the order. The Court of Queen's Bench, holding that the functions of the Insolvent Debtors' Court under the section in question were judicial and not merely ministerial, refused to issue a mandamus commanding that Court to make the order. The applicant then took proceedings in Chancery, which resulted in a decree in his favour, that the assignment to him by the insolvent was valid. The Court of Chancery further expressed an opinion that this decree rendered the duty of the Insolvent Debtors' Court in the matter simply ministerial. The latter Court, however, refused, on a renewed application to it, to act upon that opinion and make the order.

On a subsequent application now made by the claimant to the Court of Queen's Bench for a mandamus to the Insolvent Debtors' Court to make the order, held: that, after as before the proceedings in Chancery, and notwithstanding the opinion there expressed to the contrary, the Insolvent Debtors' Court retained a judicial discretion whether or not to make the order; and that therefore the mandamus could not issue.

MONTAGU CHAMBERS moved for a rule, calling upon the Commissioners of the Court for the relief of Insolvent Debtors, or the Chief Commissioner of that Court, to show cause why a writ of mandamus should not issue, commanding them or him to order that the surplus estate of George William Dyson, an insolvent debtor, should be

(a) Now repealed by the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, s. 230. The case, however, is reported, as bearing upon the construction of sect. 197 of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which contains similar provisions with respect to the estate of bankrupts.

vested in Robert Cook, as being entitled to the same under an assignment by deed, bearing date 8th July, 1850.

It appeared, from the affidavits in support of the motion, that a former application had been made to this Court in Hilary Term, 1857, and that the Court then refused to issue a mandamus to compel the *587] chief *Commissioner to make the order.(a) It further appeared from the affidavit of Robert Cook, now used, that, on 22d May, 1857, he filed a bill in the Court of Chancery against the provisional assignee and the other claimants upon the surplus estate, praying that he, the said Robert Cook, might be declared entitled to the said estate; and that the said assignee might take proceedings for the purpose of transferring the said surplus estate. Stuart, V. C., made an order, declaring that the said estate was well assigned, and that the said Robert Cook was entitled thereto. The order was, on 11th January, 1859, confirmed on appeal by the Lords Justices.(b) A copy of their decree was given to the Insolvent Court; and, on 14th March, 1859, an application was made to the said Court for an order vesting the surplus estate in the said Robert Cook; but the Court refused to make any order. A petition was then presented to the Court of Chancery, before Lord Chancellor Campbell and the Lords Justices, on 19th July, 1859, stating such application to the Insolvent Court, and the refusal of the said Court to make any order, and praying that the provisional assignee should be ordered to bring the said estate into Court; when the Lord Chancellor said that the title of the said Robert Cook was confirmed by the decree of 11th January, 1859; that therefore, under the words of stat. 1 & 2 Vict. c. 110, s. 92, the duty of the Commissioner became ministerial; and that, under the altered circumstances of the case, an application could be made to this *588] Court for a mandamus. The provisional assignee *asserted that the said estate was under the control of the Insolvent Court, and that he could not bring it into the Court of Chancery without an order from the Insolvent Court. The petition was therefore dismissed, but without costs. An application was, on 18th January, 1860, made to the Insolvent Court for a vesting order to give effect to the decree of 11th January, 1859, and the opinion of the Lord Chancellor was brought to the notice of the chief Commissioner, but he refused to make the order prayed for. It further appeared that no steps had been taken to get rid of a writ of prohibition to the Insolvent Court, which had been granted by Lord Chancellor Cranworth on 5th August, 1856, prohibiting it from dealing with the surplus fund in Court, except so far as was necessary, under stat. 1 & 2 Vict. c. 110, s. 92, to give effect to the deed of 8th July, 1850.(c)

Montagu Chambers, for his rule.—The application to the Insolvent Court is made under stat. 1 & 2 Vict. c. 110, s. 92, which directs that, if the Insolvent Debtors' Court be satisfied that all the debts in respect of which the adjudication was made have been discharged, and that there remains property in the possession or control of the assignees, "it

(a) *Regina v. Law*, 7 E. & B. 366 (E. C. L. R. vol. 90), in which report the facts of the case up to that period are to be found.

(b) *Cook v. Sturgis*, 3 De G. & J. 506.

(c) See this writ set out in the report of *Regina v. Law*, 7 E. & B., at p. 369.

shall be lawful for the said Court, on application duly made, to order that all such property so remaining as aforesaid shall be vested in the person whose debts shall have been so discharged or satisfied, or his heirs, executors, administrators, or assigns; and such order shall have the effect of vesting the same accordingly." (a) *The question [589 therefore is, whether the chief Commissioner, on Cook's application for an order vesting in him as assign the admitted surplus of Dyson's estate, is to act judicially or only ministerially. This Court, in refusing to issue a mandamus to the Commissioner to make the order, has already held that his functions in the matter are judicial, and not merely ministerial. Since that decision, however, fresh circumstances have arisen; and Cook is now entitled to the benefit of the opinion of Lord Chancellor Campbell and the Lords Justices in his favour, that, the decree of 11th January, 1859, having confirmed his title as assign, the duty of the Commissioner has now become ministerial. [HILL, J.—The Commissioner may, if he thinks fit, differ from the conclusion arrived at by the Court of Chancery. CROMPTON, J.—Although the opinion of that Court is entitled to the greatest respect, we cannot command the Commissioner to take the same view of the matter. WIGHTMAN, J.—The Commissioner has to inquire whether there was a bonâ fide assignment from Dyson to Cook, and may be of opinion that there was not.] If so, he should state as much in his return to the mandamus, which ought now to issue, or Cook will be wholly deprived of the order to which, in the opinion of the Lord Chancellor and the Lords Justices, he is clearly entitled.

COCKBURN, C. J.—I am of opinion that there should be no rule. Cook claims the surplus of Dyson's estate under Dyson's assignment to him by the deed of 1850, but the chief Commissioner thinks that deed invalid, and that the surplus belongs to the assignees under *Dyson's second insolvency. In 1857, Cook made an applica- [590 tion to this Court for a mandamus to compel the Insolvent Debtors' Court to make an order vesting the surplus in him as assignee, which was refused, on the ground that the duty of the Commissioner in making the order in question is judicial and not merely ministerial, he having to determine judicially whether there has been such an assignment as gives the applicant a title. Nothing can be clearer or more conclusive than the judgments then delivered. Mr. *Chambers* says that the circumstances of the case have since been altered, because the Court of Chancery has declared Cook to be entitled, as assignee, to the surplus; and that by reason of the decree of that Court the duty of the Insolvent Commissioner has now become simply ministerial. We do not say that the Commissioner might not have exercised a sounder discretion if he had acted in accordance with that decree; but, if he thought it erroneous, he had a right, of which we cannot deprive him, to exercise his judicial functions, and act upon his own opinion. The Court of Chancery has no power to dictate to him what his decision shall be; nor does this Court, on application to it for a mandamus to a Court having a judicial discretion, ever do more than direct the Court to hear and determine the case; we never say how the case is to be decided. In

(a) See p. 586, note (a).

granting the mandamus which is now asked for, we should be departing from that long and well established principle.

WIGHTMAN, J.—I am of the same opinion. The only question is, whether the functions of the Insolvent Commissioner are judicial or *591] ministerial. The Court has *already decided that they are judicial; and they are not the less so because the Court of Chancery has pronounced a different opinion. The Commissioner, being a judicial officer, acting under the provisions of stat 1 & 2 Vict. c. 110, is not bound by that opinion, which, though no doubt entitled to the highest respect, still leaves the Commissioner at liberty to act upon his own authority and to exercise his own discretion.

CROMPTON and HILL, Js., concurred.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN

WILLY VACATION,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1860.

The Judges of the Court of Queen's Bench who sat in banc in this Vacation were,—

WIGHTMAN, J.

CROMPTON, J.

HILL, J.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

STRAY *v.* RUSSELL. *Feb. 6.*

[Reported 1 E. & E. 916 (E. C. L. R. vol. 102).]

CURRIE and Others *v.* ANDERSON. *Feb. 7.*

Defendant, on 27th September, 1855, verbally ordered of plaintiffs, at Liverpool, goods of the value of more than 10*l.*, to be sent out to Constantinople, by a steamer named by defendant, for The Phoenix, a ship of defendant, then in the Black Sea. Plaintiffs selected the goods in accordance with the order, and sent them to the steamer, together with two barrels of flour belonging to defendant, which he had sent to plaintiffs' warehouse for the purpose of being forwarded with the other goods. Defendant told plaintiffs to make out, and plaintiffs made out, the bill of lading for the goods in their own name, making the goods deliverable to Messrs. H. & Co., or assigns, at Constantinople, to whom plaintiffs had before consigned goods, and to whom defendant, on that account, wished the goods to be made deliverable. The bill of lading included the two barrels of flour. On 13th October, 1855, plaintiffs shipped the goods, including the flour, on the named steamer, and paid freight for the whole. On 16th October, defendant repaid them the freight and received from them the bill of lading, which he forwarded to the

captain of The Phoenix, who did not receive it till March, 1856, when, finding that the goods were not forthcoming at Constantinople, he returned it to defendant. On 5th November, 1856, defendant forwarded the bill of lading to plaintiffs, enclosed in the following letter. "I enclose the bill of lading for stores sent out to the bark Phoenix. Please see after them. I think the master of the steamer must account for them."

Held that, upon these facts, there was ample evidence that defendant had accepted and actually received the goods, within the meaning of sect. 17 of the Statute of Frauds, 29 Car. 2, c. 3.

DECLARATION for goods sold and delivered. Plea. Never indebted. Issue thereon.

*593] *At the trial, before Watson, B., at the Liverpool Summer Assizes, 1859, the facts appeared to be as follows. The plaintiffs were merchants and ship chandlers at Liverpool, carrying on business under the firm of Currie, Newton & Co., and the defendant was a ship-owner at Aberdeen. On 27th September, 1855, the defendant called at the plaintiffs' office and saw Mr. Newton, one of the plaintiffs, and verbally ordered of him some stores, to the amount of 62*l.* 10*s.*, for The Phoenix, a ship of the defendant then in the Black Sea, to be sent out from Liverpool, by one of McIver's steamers, to Constantinople. The defendant directed Newton to enter the stores out at the Custom-House. Before he ordered the stores, he had asked Newton whether the plaintiffs had ever sent any goods out to Constantinople, and whether they had any agent there? Newton answered that they had no agent there, but had once consigned some goods there to Messrs. Hanson & Co. Newton, having selected the goods according to the defendant's order, namely, 5 tierces of beef, 4 barrels of pork, 2 barrels of flour, 1 barrel of peas, and 1 keg of barley, entered them out at the Custom-House, and sent them down to McIver's steamer Melita in a cart, together with two other barrels of flour, which the defendant, having purchased of some other person, had in the mean time sent to the plaintiffs' warehouse, to be sent to the ship together with the goods which he had ordered of the plaintiffs. Newton afterwards asked the defendant how the bills of lading were to be made out; and the defendant said, "Make them out in the name of the same parties you sent your goods *to," and added, "You had better *594] make them out in your own name, for they won't know me, but will know you." Accordingly, the plaintiffs made out the bill of lading thus:

"Shipped by Currie, Newton & Co." (here followed an enumeration of the goods, which corresponded with the order in all respects, except that the number of barrels of flour enumerated was four, the two sent by the defendant to the plaintiffs' warehouse, as above mentioned, being included.) "To be delivered at the port of Constantinople unto Messrs. C. Hanson & Co. or their assigns."

The plaintiffs handed the bill of lading to the agent of the steamer, and at the same time (13th October, 1855) paid freight for the whole and received back the bill of lading signed. On 16th October, the defendant called on the plaintiffs and repaid the freight, and Newton handed him the bill of lading. The defendant enclosed the bill of lading in a letter addressed to the captain of the Phoenix, to the care of Messrs. Hanson & Co., Constantinople; and wrote another letter to the captain, advising him of this. The captain, being absent on the French transport service in the Black Sea, did not receive these letters for some time, but on doing so, in the middle of March, 1856, went

to Constantinople and obtained the bill of lading from Messrs. Hanson & Co. The goods, however, were not forthcoming. It did not appear whether or not The Melita ever arrived at Constantinople. The captain of the Phoenix returned the bill of lading to the defendant, who, on 5th November, 1856, forwarded it from Aberdeen to the plaintiffs in a letter, in which he said "I enclose the bill of lading for stores sent out to the barque Phoenix. Please see after them. I think that the master of the steamer must account for them." The *plaintiffs immediately returned the bill of lading, saying that they could not interfere in the matter. And, after a long cor- [*595
respondence, they brought this action to recover the price of the stores so supplied by them.

The jury returned a verdict for the plaintiffs for the amount claimed, 62*l.* 10*s.*; and the learned Judge reserved leave to the defendant to move to enter the verdict for him if the Court should be of opinion that there was no evidence of an acceptance and receipt by the defendant of the goods, to satisfy the Statute of Frauds.

A rule having been obtained, calling upon the plaintiffs to show cause why the verdict should not be entered for the defendant on the ground that there was no sufficient evidence of an acceptance and receipt by the defendant of the goods;

Baylis now showed cause.—The facts that the goods were delivered on board The Melita at Liverpool, as directed by the defendant, and that he accepted and dealt with the bill of lading, together constitute sufficient evidence of such an acceptance and receipt by him of the goods as to satisfy the 17th section of the Statute of Frauds. [CROMPTON, J.—The keeping of and dealing with the bill of lading seem to amount to an actual receipt of the goods, according to the doctrine laid down in *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75).] (He was then stopped.)

Manisty and *Kemplay*, in support of the rule.—There was no evidence, in this case, of an actual acceptance and receipt of the goods by the defendant, sufficient to *satisfy the 17th section of the [*596 Statute of Frauds. No authority can be cited to show that the mere receipt by him, and sending out to Constantinople, of the bill of lading, was such a dealing with the bill of lading as to pass to him the property in the goods. The decision in *Meredith v. Meigh* was that the goods there in question had not been accepted within the statute; and the opinion expressed by some of the Judges, that a keeping and dealing with the bill of lading might amount to an actual receipt of the goods, was only an obiter dictum. [CROMPTON, J.—In that case the bill of lading had not been sent to the defendants, but to carriers named by them, and who were their agents only for the purpose of forwarding, not for that of accepting the goods. Coleridge, J., however, observed,^(a) "I think that, if the bill of lading had been received by the defendants themselves, especially if they had dealt with it, the case might have been different." And Erle, J., said, "I have no doubt that the bill of lading, which is the symbol of the property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself."] Those were mere dicta, and formed no part of the ratio decidendi. [CROMPTON, J.—

(a) 2 E. & B. 372 (E. C. L. R. vol. 75).

The defendant in the present case dealt, as owner, with the goods themselves, by desiring them to be sent to the ship together with other goods which were clearly his own.] In *Holmes v. Hoskins*, 9 Exch. 753,† the defendant verbally agreed to buy of the plaintiff some cattle then in his field. After the bargain was concluded, the defendant felt in his pocket for his check-book in order to pay for the cattle, but, finding that he had not it, he told the plaintiff to come to his house *in the evening for the money. It was agreed that the *597] cattle should remain in the plaintiff's field for a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. But it was held that there was no evidence of an acceptance of the cattle to satisfy the Statute of Frauds. [CROMPTON, J.—The vendor of the cattle intended to retain possession of them until he was paid.] *Farina v. Home*, 16 M. & W. 119,† is strongly in point for the defendant. There goods verbally ordered by the defendant of the plaintiff's agent in London, were sent from abroad to the agent, who warehoused them with a wharfinger, and endorsed and sent to the defendant a warrant received from the wharfinger, by which the goods were made deliverable to the agent or his assignees by endorsement, on payment of rent and charges from a certain day. The defendant kept this warrant, which had been endorsed and delivered to him by the agent, for ten months, but did not pay the charges or the price of the goods. And it was held that there was no evidence of a receipt of the goods by him, sufficient to satisfy the Statute of Frauds. *Hart v. Bush*, E. B. & E. 494 (E. C. L. R. vol. 96), in which the delivery of goods at a wharf named by the purchaser was held not to amount to an acceptance and actual receipt of them by him, within the meaning of the statute, the goods having been shipped to him, by his directions, from that wharf, and lost on their passage thence to him, shows that in the present case the delivery of the goods on board a ship named by the defendant did not satisfy the statute. [HILL, J.—In *Hart v. Bush* the goods were merely sent to a wharf which was the only wharf in London whence goods were *598] *shipped to Lancaster, where the defendant lived. 'There was no dealing by the defendant with the goods, nor did he receive any bill of lading. CROMPTON, J.—Suppose the defendant, here, had resold the goods, as the purchaser did in *Morton v. Tibbett*, 15 Q. B. 428 (E. C. L. R. vol. 69), your argument would equally apply; but could it have been said that the defendant had not accepted and received the goods?] A resale would have been an exercise of ownership, and would have made a material difference in the facts of the case. Much, moreover, that is said in *Morton v. Tibbett* may be open to doubt: *Hunt v. Hecht*, 8 Exch. 814.† The mere delivery of the bill of lading did not pass the property in the goods to the defendant. [HILL, J.—*Browne v. Hare*, 3 H. & N. 484,†(a) shows that a delivery on board ship may pass the property if it be in pursuance of the contract of sale, even though the vendor retains the bill of lading.]

WIGHTMAN, J.—I am of opinion that there was evidence in this case that the defendant so dealt with the goods and with the bill of lading as to justify the jury in finding that there was an acceptance and actual receipt by him of the goods, within the meaning of the 17th

(a) Judgment affirmed in Exch. Chamber, 4 H. & N. 822.†

section of the Statute of Frauds. The facts seem to bring the case very much within the principle thrown out by some of the Judges in *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75), in which I entirely concur. Erle, J., there says, "I have no doubt that the bill of lading, which is the symbol of property, may be so received and dealt with as to be equivalent to an actual receipt of the property itself." And Crompton, J. "When goods, or the indicia of the property in goods, remain long under the control of the *ven- [*599]dee, especially when the vendee has in any respect acted as the owner of the goods, there may be sufficient evidence of an acceptance and receipt, although the goods themselves are not received." In the present case the defendant purchases goods of the plaintiffs, and, hearing from them that they had before consigned goods to Messrs. Hanson & Co., at Constantinople, desires the plaintiffs to make out the bill of lading to that firm. The defendant also sent goods of his own to the plaintiff's warehouse, which were, by his direction, sent down to the same ship with the goods purchased by him of the plaintiffs. All the goods were put on board together, and in the bill of lading those other goods of the defendant were included with the goods the subject of the present action. The plaintiffs paid the freight in the first instance, and the defendant repaid them and thereupon received from them the bill of lading. This was in October, 1855, and, after keeping and dealing with the bill of lading for more than a year, the defendant returned it, in November, 1856, to the plaintiffs with this letter: "I enclose the bill of lading for stores sent out to the barque Phoenix. Please see after them. I think that the master of the steamer must account for them." This letter seems to me most material as evidence to show that the defendant has acted as owner of the goods, not only by keeping the bill of lading so long, but by expressly desiring the plaintiffs to see after the goods. Drawing the ordinary inference from all these facts, I think that there was abundant evidence that the defendant had so dealt with the goods as to have accepted and actually received them, within the dicta in *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75), which are clearly good law.

*CROMPTON, J.—I am of the same opinion. Before the case of *Morton v. Tibbett*, 15 Q. B. 428 (E. C. L. R. vol. 69), a general [*600] notion prevailed that there could be no acceptance and receipt of goods, such as to satisfy the Statute of Frauds, until the vendor had put himself in such a position as to be able to object to the quantity or quality of the goods. That notion was overthrown by the decision in *Morton v. Tibbett*, which must in this Court be considered to be the law of the land; and the discussion to-day has more than ever satisfied me of its correctness. In *Meredith v. Meigh*, 2 E. & B. 364 (E. C. L. R. vol. 75) the facts showed that there had been no dealing whatever with the bill of lading by the defendant; but the Judges stated the law to be that the keeping of the bill of lading or other indicia of the property in the goods might be sufficient to constitute an acceptance and receipt of the goods. In the present case, the keeping of the bill of lading by the defendant for more than a year is a very strong fact; but I am inclined to think that, independently of the doctrine laid down in *Meredith v. Meigh*, there was sufficient evidence that the

defendant had accepted and received the goods. He directed the goods to be sent on board a particular ship, and, after they had been so sent, together with other goods of his, he directed how the bills of lading should be made out, making the whole of the goods deliverable to Hanson & Co. Under all the circumstances of the case it seems to me perfectly clear that the jury were quite right in finding that there was an acceptance of the goods by the defendant.

HILL, J.—I am of the same opinion. This is a very clear case. *601] The question is whether there was evidence on *which the jury could reasonably find that there was an acceptance and receipt of the goods by the defendant, within the 17th section of the Statute of Frauds. The original order by the defendant was to send the goods for him to one of McIver's boats bound for Constantinople. Before the order was executed, the defendant sent some barrels of flour belonging to him to the plaintiff's warehouse, with directions that they were to be put on board the same ship with the other goods; and they were all sent together to the ship by one cart. Afterwards, in accordance with the defendant's directions, the bill of lading is made out in the plaintiffs' names, and by it the goods are made deliverable to Hanson & Co. or their assigns, at Constantinople, so that the defendant makes Hanson & Co. his agents to receive and deal with the goods on their arrival out. The plaintiffs pay the freight, but the defendant reimburses them and then receives from them the bill of lading, which he keeps for upwards of a year, the plaintiffs hearing nothing of it till, at the end of that time, they receive it back from the defendant enclosed in a letter in which he treats all the goods as his own. Apart, then, from any reference to the cases, or to the doctrine of constructive acceptance, I think that there was ample evidence that the defendant had dealt with the goods themselves, as owner, and that he had therefore accepted and actually received them, within the meaning of the statute.

Rule discharged.

*602] *DESLANDES v. GREGORY and Another. Feb. 7.

A charter-party, made in London, between plaintiff, shipowner, and defendants, "as agents to Samuel Ferguson, of Anamaboe, merchants and charterers," was signed "for D." (plaintiff) "owner, H. G. as agent. For Samuel Ferguson, Esq., of Anamaboe, G. brothers," (defendants) "as agents." The charter-party was partly written and partly printed, the words "merchants" and "charterers" being printed, and in the plural, throughout it. Defendants, merchants in London, acted in England as agents for Ferguson, a native of Africa, and residing at Anamaboe in that country. By the charter-party, plaintiff's ship was chartered for a voyage from London to Africa and back, and freight was made payable on delivery of the return cargo.

Held, that defendants were not personally liable, as principals, on the charter-party.

Judgment affirmed in the Exchequer Chamber.

THE declaration contained counts for freight and demurrage, money paid, and on an account stated.

Plea: Never indebted. Issue thereon.

At the trial, before Crowder, J., at the Surrey Summer Assizes, 1859, the facts appeared to be as follows. The plaintiff is a ship-owner and ship-builder residing in the Island of Jersey, carrying on

business under the name of George Deslandes & Son, and in the year 1858 was the owner of a ship called The Deslandes. The defendants are merchants carrying on business in the city of London. In July 1858, the plaintiff, being desirous of obtaining a charter for his said ship, instructed Mr. Henry Gamman, a ship-broker in the city of London, to procure a charter for her; and, on 30th July, 1858, a charter-party, of which the following is a copy, and which was on a printed form, filled up where requisite in ink, the words "merchants" and "charterers" being printed throughout it, was signed by the said Henry Gamman and the defendants.

"Gamman,
Shipbroker,
London.

"London, 30th July, 1858.

"Charter-party.

"It is this day mutually agreed between George Deslandes & Son, owners of the good ship or vessel called The Deslandes, of Jersey, and of the register measurement of *153 tons or thereabouts, [*603 and now lying in the port of London, of the one part, and Messrs. Gregory, Brothers, as agents to Samuel Ferguson, of Anamaboe, merchants and charterers, of the other part: That the said vessel being tight, staunch, and strong, and every way fitted for the voyage hereinafter mentioned, shall with all possible despatch be made ready in the Saint Katharine Dock, and there, or in the river Thames, both or either, receive and take on board all such lawful goods or merchandise as the said charterers or their agents may send alongside the vessel, and proceed therewith and deliver the same at any place or places on the west coast of Africa, between Cape Palmas and Cape Formosa, both inclusive, and reload between the same limits, from the agents or correspondents of the said merchants, a full and complete cargo of palm oil, with a fair proportion of small casks for broken stowage, or other lawful merchandise, but in any case not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded shall proceed therewith and deliver the same according to bills of lading, at London, direct into one of the docks as ordered, or so near thereunto as she can safely get (the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). Freight to be paid for the whole voyage, out and home, for the whole reach and burthen of the vessel's hold from bulkhead to bulkhead, as follows: The lump sum of 735*l.* sterling in full, payable on correct delivery of return cargo in cash, less advances in Africa and two months' discount. Sixty running days are to be allowed the said charterers (if *the ship is not sooner despatched) for the un- [*604 loading and reloading the said ship on the coast of Africa, to commence on her being ready to unload at her first ordered place of discharge, and to continue and be reckoned until her being reloaded or finally despatched from her last place on the coast of Africa; all days occupied in the vessel moving from place to place to be counted as lay days, and forty days on demurrage at 4*l.* per day. The homeward cargo to be unloaded on arrival at port of discharge with all possible despatch. The cargoes to be sent and taken from alongside

at charterers' expense and risk, but to be taken on board, measured, and stowed at the expense of the ship, an efficient stevedore being employed in London. Cash for ship's necessary disbursements in Africa to be advanced the master by the charterers' agents there, free of commission and interest, against his draft in triplicate on the owners of the vessel, and to be deducted in settlement of freight; but should the vessel be lost, the owners to pay the said draft on demand. The agents of the charterers to have liberty to ship specie or goods on board the said vessel in Africa, to be taken from place to place within the said limits and delivered free of freight, also any persons on deck or in the cabin, they wholly finding themselves. The charterers to have liberty to send any passengers either out or home in the cabin of the said vessel, paying 15*l.* for the passage of each either way, to be provided with master's fare. No goods or passengers to be taken in the said vessel other than for the charterers, or with their consent in writing. Should it be necessary for the vessel to take in dunnage or ballast in London, the same to be provided by the owners. A fair gratuity to be paid to the master by the charterers on the satisfactory completion of the *voyage. The *605] master to sign bills of lading for any rate of freight, without prejudice to this charter-party. Notice in writing to be given by the master to the charterers or their agents, in all cases, when the vessel is ready to load or discharge. Penalty for non-performance of this agreement, 700*l.* sterling; it being agreed that for the payment of all freight, dead freight and demurrage, the owner shall have an absolute lien and charge on the said cargo. Five per cent. commission is due on signing this charter-party to Henry Gamman, ship and insurance broker, 29, Great Saint Helen's, Bishopsgate Street, London, to whom the vessel is to be consigned on her return to the port of London.

"For George Deslandes & Son, of Jersey, owners,

"H. GAMMAN, as agent.

"For Samuel Ferguson, Esq., of Anamaboe,

"GREGORY, BROTHERS, as agents.

Samuel Ferguson, the person named in the charter-party, was a black man resident and trading at Anamaboe on the Coast of Africa; but while the charter was in negotiation he was in London, and was seen at the defendants' office by the said Henry Gamman in the course of the negotiation. The charter, however, was not negotiated with him, but with the defendants.

It was contended, on behalf of the defendants, that the defendants were not personally liable on the charter-party. The learned Judge directed a verdict for the plaintiff for 806*l.* 12*s.*, but reserved leave for the defendants to move to enter the verdict for them, if the Court should be of opinion that, upon the proper construction of the charter-party, the defendants were entitled to succeed.

*606] **Lush*, in Michaelmas Term, 1859, obtained a rule calling upon the plaintiff to show cause "why the verdict" "should not be set aside, and a verdict entered for the defendants instead thereof, or why a nonsuit should not be entered, on the ground that, upon the true construction of the charter-party, the defendants are not liable as principals."(*a*)

(*a*) The rule nisi was also granted for a new trial, on the ground that evidence tendered by the defendants, as to what passed before the charter-party was signed, and showing that they

Bovill now showed cause.—The defendants are personally liable as principals on this charter-party. Although a printed form was used, the language of the whole of the document must be looked at; and although the defendants sign as agents for Ferguson, they are, throughout, treated as the contracting parties. The words “merchants and charterers” describe them, and not Ferguson. And wherever anything is stipulated to be done by the charterers or their agents, the plural is used. Some of these stipulations, that, for instance, for payment of freight “on correct delivery of return cargo” in London, could not be performed by Ferguson, who resides in Africa. In *Tanner v. Christian*, 4 E. & B. 591 (E. C. L. R. vol. 82), the defendant was made a party to an agreement “for and on the part of N.,” but the Court held that he was personally liable upon it, as he was the contracting party, and had by the terms of the contract engaged himself to do that which was stipulated for. In that case it is true the defendant signed the agreement, not “for and on the part of N.,” but in his own name. But in the subsequent case of **Leonard v. Robinson*, 5 E. & B. 125 (E. C. L. R. vol. 85), the defendants, [*607 who, in the body of a charter-party, had contracted as principals, signed it “by authority of, and as agents for, S.,” notwithstanding which they were held personally liable, as being themselves the contracting parties, although they might have become so by the authority of and as agents for their employer, and might thus have a remedy against him. [HILL, J.—In that case there was no reference whatever, in the body of the instrument, to the existence of a principal, which was to be gathered only from the signature.] In *Parker v. Winlow*, 7 E. & B. 942 (E. C. L. R. vol. 90), the defendant was described in the body of the charter-party as “agent for E. W.,” but the Court were clearly of opinion, though it became unnecessary to decide the point, that he was nevertheless personally liable. *Green v. Kopke*, 18 C. B. 549 (E. C. L. R. vol. 86), which may be relied upon by the other side, was a case of bought and sold notes, the language of which clearly excluded all personal liability on the part of the defendant: the bought note expressing that the goods were “bought through” the defendant of R., his principal, and the sold note that they were “sold on behalf of” R., the sold note being moreover signed by the defendant “as agent.” [HILL, J.—In the present case the defendants are made parties to the charter-party as agents, and sign it as agents. There would have been some foundation for your argument had they signed it in their own names, omitting the words “as agents.” CROMPTON, J.—They sign exactly in the same form as Gamman.] Gamman is not a party to the instrument, but the defendants are.

Lush, in support of the rule.—If the defendants have *not [*608 protected themselves from personal liability, it is difficult to see how any agent can ever safely enter into a contract as agent only. The cases cited on the other side are distinguishable from the present in this respect, that, in them, the respective defendants had either been made parties to the agreements absolutely, though they signed as agents, or had omitted to sign as agents, though they had contracted as such; whereas, here, the defendants both contract and sign as

intended to contract as agents only, ought to have been admitted. But this point was not now argued.

agents. The only possible ground for saying that they are personally liable is that the words "merchants and charterers," in the body of the charter-party, are in the plural. But it is evident that by those words Ferguson was intended, and that, a printed form being used, the correction of them into the singular was inadvertently omitted. [CROMPTON, J.—The strict grammatical construction arising from the collocation of the words is that they describe Mr. Ferguson. and the "s" at the end of them is much too slight a matter to qualify the rest of the document.] (*Lush* was then stopped.)

WIGHTMAN, J.—I am clearly of opinion that the defendants are not liable. Their signature is plainly expressed to be "for" "Ferguson" and "as agents." If that is not enough to exclude them from personal liability, they having contracted in the body of the charter-party, also, as agents, I am at a loss to see what other mode of signature would be sufficient. The only ground which the plaintiff can rely upon is, that in a printed form of charter-party the letter "s" is printed in the words "merchants" and "charterers:" but, as my brother Crompton has pointed out, those words, on a strict construction, *609] apply more clearly to Mr. Ferguson than to the *defendants. Had the defendants signed the charter-party in their own names merely, there would have been much more to be said in favour of the plaintiff's contention: but they have signed in the same way as Gamman, the agent for the plaintiff. It appears to me that the plaintiff's intention was to make the contract with Ferguson; if he intended to make it with the defendants he should have objected to the form in which they signed it. No case has been cited which goes so far as to show that an agent is liable upon a contract such as the present, which both in the body and at the conclusion is expressed to be made by him as agent.

CROMPTON, J.—I am of the same opinion. I think that Lord Ellenborough expressed the rule correctly, when he said that persons who put their names to a document thereby make themselves personally liable, unless they state upon the face of it that they sign it for another.(a) And I agree that, if it is left ambiguous on the face of the instrument whether they have so signed it, the construction most against the persons signing should prevail; a principle which has been adopted in several recent cases. Here, however, the defendants not only contract, in the body of the charter-party, but also sign it, as agents for Ferguson; signing in the same manner as Mr. Gamman, the plaintiff's agent. They have, therefore, sufficiently protected themselves from personal liability on the contract. The whole argument for the plaintiff depends upon the retention of the letter "s" in the words "merchants" and "charterers." That, however, was clearly *610] a mistake, and is too slight a circumstance to *weigh against the whole tenor of the rest of the document; especially as the error occurs in that part of it which is printed.

HILL, J.—I am of the same opinion. The point seems to me to be determined by the form of the signature to the charter-party, which is, in effect, the signature of Ferguson, by Gregory, Brothers, as his agents, not the signature of Gregory, Brothers, binding them person-

(a) The learned judge probably referred to the dicta of Lord Ellenborough in *Leadbitter v. Farrow*, 5 M. & S. 345, 349.

ally. The description of the defendants in the introductory part of the charter-party, as Ferguson's agents, is ambiguous, and might not, taken alone, have been sufficient to exclude the defendant's personal liability; but the signature clearly shows that the intention of the parties was that Ferguson should be the party to the contract: hence, the signature of the defendants imposes no further obligation upon them than that implied by law, namely, that they had authority, as agents, to bind Ferguson. Rule absolute.

IN THE EXCHEQUER CHAMBER. *June 15.*

(Error from the Queen's Bench).

DESLANDES *v.* GREGORY and Another.

For head-note, see *antè*, p. 602.

FROM the above decision the plaintiff appealed.

The case was now argued(a) by *Bovill*, for the *appellant. His argument was in substance the same as in the Court [*611 below, but he further cited *Alsager v. St. Katherine's Dock Company*, 14 M. & W. 794,† as showing that, in a charter-party, partly printed and partly written, the construction of the printed words ought not to be different from that of the written; and he contended that the Court below had not given due weight to the fact that the words "merchants" and "charterers," in the charter-party, were in the plural. And, in addition to the cases which he relied on in the Court below, as showing that the form in which the charter-party was drawn and signed did not exclude the defendants' personal liability, he cited *Kennedy v. Gouveia*, 3 D. & R. 503 (E. C. L. R. vol. 16), *Cooke v. Wilson*, 1 C. B. N. S. 153 (E. C. L. R. vol. 87), *Wilson v. Zulueta*, 14 Q. B. 405 (E. C. L. R. vol. 68).

J. Browne, for the respondents, was not called upon.

WILLIAMS, J.—We are all of opinion that the judgment of the Court of Queen's Bench was right. The form of the charter-party and the mode of signature, taken together, are decisive to show that the defendants did not bind themselves by the contract as principals. They sign "For Samuel Ferguson, Esq., of Anamaboe, Gregory, Brothers, as agents." It would require extremely plain words in the body of the contract to control the effect of that mode of signature, and no such words are to be found there, the contract purporting to be made by "Messrs. Gregory, Brothers, as agents to Samuel Ferguson, of Anamaboe, merchants and charterers." The only argument that can be relied upon by the appellant is that the words "merchants" and "charterers" are in *the plural; but this evidently [*612 happened by mistake, and the words occur, moreover, in the printed part of the charter-party.

MARTIN, B., CHANNELL, B., WILDE, B., WILLES, J., and BYLES, J., concurred. Judgment affirmed.

(a) Before Williams, Willes, and Byles, Js., Martin, Channell, and Wilde, B.

IN THE EXCHEQUER CHAMBER. *Feb. 8.*

(Error from the Queen's Bench.)

WARDLE v. BROCKLEHURST.

[Reported, 1 E. & E. 1065 (E. C. L. R. vol. 102).]

IN THE EXCHEQUER CHAMBER. *Feb. 8.*

(Error from the Queen's Bench.)

RADCLIFFE v. ANDERSON.

[Reported, 1 E. B. & E. 819 (E. C. L. R. vol. 96).]

*613] *The QUEEN v. JOHNSON. *Feb. 8.*

After a verdict of Not guilty upon an indictment for obstructing a highway, a new trial will not be granted on the ground that the verdict was against evidence; although the Judge who tried the case reports that he is dissatisfied with the verdict.

INDICTMENT for making obstructions in a public and common highway, situate in the parish of Long Sutton, in the county of Lincoln, whereby the said highway was obstructed and straitened. Plea, Not guilty. Issue thereon.

This indictment was removed by certiorari into this Court, and was tried before Cockburn, C. J., at the Lincolnshire Summer Assizes, 1859, when the jury returned a verdict for the defendant of Not guilty.

Field had obtained a rule, calling upon the defendant to show cause why there should not be a new trial on the ground that the verdict was against the weight of evidence.

COCKBURN, C. J., reported that he was dissatisfied with the verdict.

Hayes, Serjt., now showed cause.—There can be no new trial. It is contrary to the practice of the Court to grant a new trial in a criminal proceeding, after a verdict of Not guilty, except for a misdirection of the Judge. *Rex v. Burbon*, 5 M. & S. 392, *Rex v. Wandsworth*, 1 B. & Ald. 63, are instances in which a new trial was refused.

*614] after such a verdict *upon an indictment for the non-repair of a highway. In *Rex v. Mann*, 4 M. & S. 337 (E. C. L. R. vol. 80), where the indictment was for a nuisance to a highway, the same practice was followed; Lord Ellenborough, C. J., saying, "unless you can point out some distinction between the case of a nuisance and other criminal cases, the general rule is that we do not grant a new trial upon an indictment for a misdemeanour, where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right; yet it is in form a criminal pro-

ceeding, and may subject the defendant to be punished criminally." And his Lordship referred to *Rex v. Reynell*, 6 East 815 where the Court refused to grant a rule nisi for a new trial after a verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence. In *Rex v. Wandsworth*, 1 B. & Ald. 63, the Court, under very special circumstances, suspended the entry of the judgment of acquittal, so as to have the question reconsidered upon another indictment, without the prejudice of the former judgment. In the present case no special circumstances are shown: and although perhaps the Court might, as was suggested by Lord Campbell, C. J., in *Regina v. Russell*, 3 E. & B. 942 (E. C. L. R. vol. 77), grant a new trial in a case where the proceeding, though in form criminal, is really for the sole purpose of trying a civil right and does not charge any offence, the present is not a case of that description. Having been once acquitted, the defendant ought not to be put in jeopardy a second time for the same cause.

Field, in support of the rule.—*Rex v. Wandsworth* *is, in effect, an authority in favour of the Crown; for, by suspend- [*615 ing the entry of the judgment of acquittal, so as to have the question reconsidered upon another indictment, though without the prejudice of the former judgment, the Court practically granted a new trial in that case. There may be a new trial for a misdirection by the Judge in a case like the present. [HILL, J.—There would then be no acquittal upon the merits.] As to the defendant's supposed right not to be twice vexed for the same cause, *Rex v. Wandsworth* shows that there are circumstances under which the Court will permit a fresh indictment to be preferred. Besides, this is substantially a civil proceeding, though in form criminal. [HILL, J.—Not entirely so. If the defendant should be found guilty he might be sentenced to fine and imprisonment. The verdict would not simply bind the right.]

WIGHTMAN, J.—I had, at first, very great doubts in this case; but the argument has now convinced me that, in making this rule absolute, we should be taking quite a new course. So far as I am aware, there is no case to be found in which a new trial has been granted, on the ground that the verdict was against the evidence, after a verdict for the defendant upon an indictment for the obstruction of a highway. The case went to the jury upon the merits; and they, contrary to the opinion of the Lord Chief Justice, and contrary, perhaps, to the opinion which this Court would have entertained, found for the defendant. I think that we ought not, on that *account, to grant a [*616 new trial. This is a criminal proceeding. It is said that it is, substantially, brought to try a civil right; but other incidents than the determination of the mere civil right would result from a verdict adverse to the defendant. The verdict would not bind the right, and the defendant might be sent to prison. Other incidents which would attach to the verdict, such as costs, may be mentioned; which tend to show that a new trial ought not to be granted. It is far better to abide by the usual rule that, in a case to which, although a civil right is in question, many incidents of the criminal law attach, and in which a verdict does not bind the civil right, a new trial cannot be granted.

on the ground that the verdict is against the evidence. The prosecutor may, if he chooses, prefer another indictment.

CROMPTON, J.—I am of the same opinion. It is a leading rule that we do not interfere by granting a new trial in a case of this kind, where there has been a decision upon the merits. Now and then there may be exceptions, but the Court ought to be very careful how it interferes; and I adhere to what I said on the subject in *Regina v. Russell*, 3 E. & B. 943 (E. C. L. R. vol. 77). Here, the case went to the jury on the merits; and, although the learned Judge who tried it reports that he is dissatisfied with the verdict, I think that, if we granted a new trial, we should be assimilating our practice in criminal to that which prevails in civil matters. The question of costs is another objection, and is also the consideration that the civil right is not bound by the verdict. The charge of obstructing *a highway
*617] is, moreover, of a more criminal nature than that of the non-repair of a highway; which raises, chiefly, a mere civil question of liability or non-liability to repair. The cases cited were all cases of non-feasance, not of misfeasance. If we were to grant a new trial in a case of misfeasance, it difficult to say where we should stop. We might in time entertain such applications in all cases of indictments for nuisances, assaults, and, perhaps, even felonies. It is a far better course to leave the prosecutor to prefer a fresh indictment.

HILL, J.—I am of the same opinion. The defendant has been found Not guilty, after a trial of the case upon the merits. It is sought to set the verdict aside on the ground that it was against the evidence; but there is no direct authority for a new trial on that ground in such a case; and to grant it would be to violate a rule of practice hitherto adhered to. The fact that the verdict does not bind the right is very important; and the defendant would be put in jeopardy of fine or imprisonment a second time if we were to make this rule absolute.

Rule discharged.

*618] *WORTHINGTON v. GIMSON. *Feb. 7 and 8.*

Certain land, part lying in the parish of N., part in the parish of V., belonged, in 1820, to H. and P., each being seised of an undivided moiety of the whole. A right of way existed from a farm, part of this property, in N., across certain lands on the said property, in V., part of the same farm, to another farm on the said property, in V.; and this right of way had for many years been used by the occupiers of either farm. In 1820, by a deed of partition, H. conveyed his undivided moiety of the part of the property in N. to P., including, among other farms, so much of the farm lying in N. and V. as was in N., "with their and every of their rights, members, easements, and appurtenances." P. also, by the deed, conveyed his undivided moiety of that part of the property lying in V. to H. The deed contained no express reservation of the right of way to either party. Plaintiff, the present occupier, and the previous occupiers of the farm in N., used the right of way from 1820 to 1859, when it was obstructed by defendant, the then occupier of the farm in V.

In an action by plaintiff for such obstruction: Held, that he could not recover; the right of way not passing under the deed of partition, and not being an apparent and continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed.

THE declaration stated that plaintiff was possessed of a messuage, farm, buildings, garden, and land, with the appurtenances, and by reason thereof was entitled to a way from the said messuage, &c.,

unto, into, through, over, and along certain land of defendant, for plaintiff and his servants, &c., yet defendant obstructed the said way.

Pleas. 1. Not guilty. 2. That plaintiff was not by reason of his possession of the said messuage, farm, buildings, garden and land, with the appurtenances, entitled to the alleged way in the declaration mentioned, in manner and form as alleged.

Issues thereon respectively.

At the trial, before Williams, J., at the Leicestershire Summer Assizes, 1859, it appeared that the plaintiff was the occupier of a farm and house at Naneby, a hamlet of Market Bosworth, in the county of Leicester; and that he also occupied therewith two closes in the adjoining parish of Newbold Vernon. These two closes adjoined part of a farm occupied by the defendant *under Sir [*619 W. Hartopp, and situated in Newbold Vernon. The way mentioned in the pleadings passed from the plaintiff's farm buildings across one of his said closes in Newbold Vernon, and then across the farm of the defendant. It was proved that the way had been used by the plaintiff and his father, who occupied the farm before him, for more than forty years, and that it had been rendered impassable by an obstruction caused by the defendant in January, 1859. It appeared that, since the date of the partition-deed hereafter mentioned, the owner of the farm occupied by the defendant had been only a tenant for life. For many years prior to January, 1820, the owners of the two farms had been jointly interested in them, the late Sir E. C. Hartopp being seised of one undivided moiety, and the late Mr. John Pares of the other. In January, 1820, a partition-deed was entered into between Sir E. C. Hartopp and Mr. John Pares, whereby the Newbold Vernon portion of the land, with the exception of the two closes before referred to, were conveyed to the use of the Hartopp family, and the Naneby portion, together with the said two closes, were conveyed to Mr. John Pares absolutely. The last-mentioned estate came by sale into the possession of one Harris, who was the owner of it at the time this action was brought. The way had existed and had been used for many years by the occupiers of either farm; but there was no express reservation in that part of the partition-deed by which Mr. Pares granted his undivided moiety. The grant by the same deed, by Sir E. C. Hartopp, of his undivided moiety in the Naneby estate to Mr. Pares, conveyed, with other farms, that occupied by the plaintiff, "with their and every of their rights, members, *easements, and appurtenances." The jury found [*620 that the occupiers of the Naneby farm had enjoyed the way as of fact up to and before the deed of partition, and also that the way had been enjoyed for twenty years since the partition-deed up to the time of the obstruction. The learned Judge, notwithstanding this finding, nonsuited the plaintiff, reserving to him leave to move that the verdict should be set aside, and a verdict with nominal damages entered for him instead thereof.

Mellor obtained a rule to that effect, on the grounds, first, that the way in question passed by the effect of the deed of partition of January, 1820; secondly, that it passed by implied grant on the separation of the two tenements over which it lay; thirdly, that the plaintiff was

entitled to recover upon the finding of the jury that, since the partition, he had for twenty years enjoyed the way.

Macaulay and *Phipson* now showed cause.—The rule must be discharged. It is true that the jury have found that the way existed as a way in fact, before and up to the deed of partition in 1820; but they have not found that it had, before and up to that time, been used as of right. Moreover, up to that time, the seisin of the land and of the way was in the same persons. Now the law was correctly laid down in *James v. Plant*, 4 A. & E. 749, 761 (E. C. L. R. vol. 31), to be “that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of *the re-
*621] spective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word;” but that, in such a case, “in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one ‘used and enjoyed with the land’” conveyed. The deed of partition, in the present case, does not satisfy either of these requirements. The other side will contend that the way passed under the conveyance, by that deed, of the farms “with their and every of their rights, members, easements, and appurtenances.” “Appurtenances” is, however, the only one of those words which could include this way; and *James v. Plant*, 4 A. & E. 749 (E. C. L. R. vol. 31), which will be relied upon for the plaintiff as establishing that the way passed under that word, is, in reality, an authority to the contrary. The decision there turned upon the intention of the parties to a deed of partition, as inferred by the Court from the frame and texture of the deed itself. By that deed the grantors conveyed to the grantee certain lands, messuages, and tenements “and all” “ways, paths, passages,” “easements,” “and appurtenances whatsoever” thereto “belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof;” “to hold” the premises thereby granted “and every part and parcel thereof, with their and every of their appurtenances” to the grantee. The Court
*622] held that the word “appurtenances,” in the *habendum, might be construed with reference to the preceding words of grant, and that, looked at with reference to that context, the word was not confined to that which was in legal strictness an appurtenant, such as an easement, the enjoyment whereof had never been interrupted by unity of possession, or extinguished by unity of seisin, but that it would let in and comprehend a right of way which, as appeared upon the face of the pleadings, had been “usually held, used, occupied, or enjoyed” with part of the lands conveyed, and which therefore fell within the language of the operative part of the deed. *James v. Plant* is not therefore in point in the present case, the deed here containing no words from which the Court can collect an intention that ways not legally incident to the lands conveyed should pass as “appurtenant” thereto. (They were then stopped.)

Mellor and *Field*, in support of the rule.—The way passed by the

deed of partition: if not under its express words, at all events by implication; for it clearly was the intention of the parties that not only legal easements over the property, but all actual existing means of enjoying it, should pass. The judgment in *James v. Plant* was founded, not so much, as is said by the other side, on the particular words used in the deed there in question, as on the obvious intention of the parties. The Court said: (a) "The reasonable inference must be that, in a deed making a partition," "it was the intention of the contracting parties that each" "should take the whole of the estate allotted to her as her share, in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied *at the time such partition was made." [WIGHTMAN, J.— [*623 The Court there allude to the general inference of intention resulting from the object of the parties being that of effecting a partition. But, further on in the judgment, they say (b) that they "think the intention of the parties, that the way should pass, is to be inferred more particularly from the form and texture of the deed itself."] Due weight should be given, in the present case, to the general inference, although materials for the particular inference may be wanting. [CROMPTON, J.—In *Gale on Easements*, p. 81 (3d ed.), it is laid down that an implied grant is not confined to enjoyments necessarily part of the grant, but that anything indicated as a mode of enjoyment of the grant, whether necessarily part of it or not, may be included.] The right of way, here, was, up to and at the time of the partition-deed, necessary to the full enjoyment of the farm occupied by the plaintiff, and a grant of it ought therefore to be implied from the severance of the property by the partition: *Pyer v. Carter*, 1 H. & N. 916,† *Glave v. Harding*, 27 L. J. N. S. Ex. 286. In *Gale on Easements*, p. 81 (3d ed.), it is said that "upon the severance of an heritage a grant will be implied, first, of all those continuous and apparent easements which have in fact, been used by the owner during the unity, [and which are necessary for the use of the tenement conveyed], though they have had no legal existence as easements: and, secondly, of all those easements without which the enjoyment of the severed portions could not be had at all." This way had been constantly and regularly used, up to the time of the partition; it was known and apparent to both the parties to the partition; *and complete enjoyment of the [*624 portion of the property in the occupation of the plaintiff could not then, and cannot now, be had without it.

WIGHTMAN, J.—I am of opinion that this rule must be discharged. The question is, whether the right of way claimed by the plaintiff passed under the deed of partition. I think that the ground upon which *James v. Plant*, 4 A. & E. 749 (E. C. L. R. vol. 31), was decided is conclusive on this question. For it is clear that had not the words "all" "ways, paths, passages" "and appurtenances whatsoever" "belonging or in any wise appertaining," to the premises conveyed "or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof," been inserted in the deed there before the Court, no way would have been held to pass under the word "appurtenances" in the habendum,

(a) 4 A. & E. 763.

(b) 4 A. & E. 764 (E. C. L. R. vol. 31).

but one which was a way legally incident to the enjoyment of the property. The insertion of those words, however, led the Court, I think rightly, to the conclusion that the word "appurtenances" was capable of receiving a more enlarged meaning from the context, and was, consequently, "not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it" would "let in and comprehend the right of way which" had been "usually held, used, occupied, or enjoyed with the" "estate, as" "expressed in the operative part of the deed itself." They added, "The deed itself forms a glossary for the word, by which *625] glossary it is to be interpreted." If we could discover from the deed in the present case any words indicating an intention to pass other than legal incidents to the property as "appurtenant" thereto, we might put a construction upon it in favour of the intention. But there are no such words to be found in the deed. It is also said that this case is one of that class of which *Pyer v. Carter*, 1 H. & N. 916,† is an instance, in which the enjoyment of an easement over property has been held to pass by implication, as an apparent and necessary part of the grant of the property. In *Pyer v. Carter* it was held that the purchaser of a house was entitled, without any express reservation or grant, to the use of a drain running from it under an adjoining house; on the ground that he purchased the house as it was, and that the use of this drain was necessary to it. The principle of that case would have been applicable to the present, had there been any proof that the way now in dispute was a way of necessity. But such proof is wholly wanting.

CROMPTON, J.—I am of opinion that my brother Williams was quite right at the trial, and that we cannot enter the verdict for the plaintiff upon the findings of the jury. We are asked to do so upon the finding that there had been an actual use of the way, up to the time of the partition; although it is not found that the way was used of necessity. Mr. Gale, in his work on Easements, states very clearly the class of easements which pass by implication. At p. 76 (3d ed.) he says, "Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements by implication *626] of law, without any words of new grant or conveyance. In deed, properly speaking, such easements are not revived, but newly created, by an implied grant." "The same observation applies to easements, commonly called 'of necessity.'" He adds: "Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner 'uses language to show that he intended to create the easement de novo.'" The last words of this passage are those of Bayley, B., in *Barlow v. Rhodes*, 1 C. & M. 448.† in which case a question was raised, which does not here arise, whether parol evidence was admissible in explanation of the terms of a deed of grant. We are also asked to say that the way in dispute in the present case passed under the word "appurtenances" in the deed of January, 1820. But in *James v. Plant*, 4 A. & E. 749 (E. C. L. R. vol. 31), which is relied upon in support of that contention, language was used in the deed of partition which showed that the intention of the parties was that the way should pass, and the Court held that the

subsequent general word "appurtenances" might be properly construed in a sense wide enough to give effect to that intention. In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an *easement. It would be a dangerous innovation if the jury were allowed to be asked to say, [*627 from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease.

HILL, J.—I am of the same opinion. I found my judgment upon this, that there is nothing in the deed to indicate that the parties intended to use the word "appurtenances" in any other than the strict legal sense of the word; and that the right of way claimed by the plaintiff is not within that sense.

Rule discharged.

There is some inconsistency in the English cases on the question whether, on severance of an estate, an easement, which is necessary to the enjoyment of the land granted, but is not apparent and continuous, would pass by the ordinary words of conveyance, without a special grant or some such words as would bring the case within the rule of *James v. Plant*. The case of *Pyer v. Carter*, if not bad law, has been much shaken by the remarks of Baron Martin in *Dodd v. Burchall*, 8 Jurist N.S. 1181; and of the Lord Chancellor in *Suffield v. Brown*, 9 Law Times Rep. 627; although quoted approvingly by Lord Campbell in *Ewart v. Cochran*, 7 Jurist N. S. 925, and recognised by the M. R. in 9 Law Times Rep. 192. In *Dodd v. Burchall* some distinction was taken by the court between a "drain" and a "way," the former being said to be corporeally attached to the land.

In *Johnson v. Jordan*, 2 Metc. 284, the owner of two adjoining houses, who occupied one and rented the other, constructed a drain from the one leased

through the one occupied, and on the same day sold both to different purchasers. The deed to the purchaser of the one which had been leased did not mention the drain. He could with reasonable expense have made a drain without going through the other lot. Held, the right to the drain did not pass. But where a ditch is cut through a whole tract, and the owner afterwards sells the upper portion, he cannot put an obstruction in that part which he retains: *Shaw v. Etheridge*, 3 Jones Law, N. C. 800. In *Brackley v. Sharp*, 2 Stock. N. J. 206, in the partition of a heritage, a distinction is taken between purchasers and heirs.

Although an easement may have been suspended or merged by unity of title, yet if it be apparent and continuous, it will pass to the alienee, on severance, without express words: *Kieffer v. Imhoff*, 26 Penna. St. Rep. 438; *McCarty v. Kitchenman*, 47 Id. 239; and so in Louisiana under civil law: *Durell v. Loisblanc*, 1 La. Ann. R. 407.

BANNISTER v. HYDE and COLLINS. Feb. 13.

The man in possession of goods distrained for rent, having quitted the house for the purpose of refreshment, found, on his return, the door purposely locked against him by the tenant, and broke it open for the purpose of re-entering. Held that, there being no evidence of an abandonment of the distress, the man in possession was justified in so re-entering.

THE declaration stated that defendant broke and entered plaintiff's shop and dwelling-house, and broke open the outer and other doors of the said shop and dwelling-house, and severed and removed from the said shop and dwelling-house divers trade and other fixtures of plaintiff, and seized plaintiff's goods, and converted the said fixtures and goods to defendant's own use, and wrongfully deprived plaintiff of the use and possession thereof.

*628] *Plea. Not guilty, by stat. 11 G. 2, c. 19, s. 21. Issue thereon.

At the trial, before Blackburn, J., at the Surrey Summer Assizes, 1859, it appeared that the plaintiff was tenant of the shop and dwelling-house in question to the defendant Hyde; and that, on 29th April, 1859, the other defendant Collins, a broker employed by Hyde for the purpose, levied a distress upon the premises for a quarter's rent in arrear. A man named Mitchell was put into possession of the distress, and remained in possession till 4th May following; when he went out of the house for a short time to get some beer, and on his return found that the plaintiff had locked him out. The plaintiff refused to allow him to re-enter, whereupon Mitchell, with the sanction of both defendants, broke open the back door, and re-entered; not being otherwise able to obtain an entrance. The goods were condemned on the following day.

The learned Judge was of opinion that this re-entry was justifiable under the circumstances, and he directed the plaintiff to be nonsuited.

Doyle, in last Michaelmas Term, obtained a rule, calling on the defendants to show cause why the nonsuit should not be set aside and a new trial had, on the ground that the learned Judge ought not to have directed a nonsuit.

Malcolm now appeared to show cause, but the Court called upon *Doyle* to support the rule.

Doyle, in support of the rule.—The man in possession had no right to break open the outer door to regain admission. The plaintiff cannot, perhaps, contend that the distress had been abandoned; *629] but the man in possession was certainly not ejected by the tenant, but went out voluntarily, for a purpose of his own. No doubt he intended to return; but he had no right to regain admission by force. The person who put him in possession ought to have made arrangements to prevent the necessity of his leaving the house. [BLACKBURN, J.—He had his meals in the house; but went out for some drink. I did not put it to the jury whether he went out for a reasonable purpose.] *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15), will probably be relied on for the defendants. But that case merely decides that it is not necessary for the landlord, on distraining goods, to leave any one in possession of them; and is no authority to show that where some one in possession chooses to leave the house he may break it open to regain admission. *Russell v. Rider*, 6 C. & P.

416 (E. C. L. R. vol. 25), shows that such an act is illegal. [CROMPTON, J.—In that case the length of time which elapsed before re-entry was made was considered as evidence of an abandonment of the distress: if there had been no abandonment, there would have been a right to re-enter. BLACKBURN, J.—That case is rather against the plaintiff.] The question here is, whether, at all events, there was, under these circumstances, any right to re-enter by force. [BLACKBURN, J.—In *Eagleton v. Gutteridge*, 11 M. & W. 465,† it was held that there was.] There the man in possession had been forcibly ejected. [CROMPTON, J.—Does not the keeping out the man in possession, the goods distrained being still in gremio legis, come to the same thing?] The re-entry ought not to be made in any way likely to lead to a breach of the peace. That seems to be the view taken by the Court *in *Rich v. Woolley*, 7 Bing. 651 (E. C. L. R. vol. 20). [*630] [WIGHTMAN, J.—Have you any authority for the distinction between a forcible putting out and a forcible keeping out?] There does not appear to be any direct authority upon that point. In *Dod v. Monger*, 6 Mod. 215, it was held that, where the distrainer had quitted possession of the goods, the retaking possession of them by the tenant was not a rescous. But Bayley, J., in *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15), points out that *Dod v. Monger* must be considered with reference to the state of the law at the time when it occurred, that is before stat. 11 G. 2, c. 19; until the passing of which statute the landlord had no right to keep the goods on the premises, and, therefore, if he quitted possession whilst the goods remained on the premises, would be held to have abandoned the distress. [CROMPTON, J.—I doubt whether, in the present case, there was even a retaking at all. Had the man in whose charge the goods were really given up possession, even for a moment?] In *Blades v. Arundale*, 1 M. & S. 711 (E. C. L. R. vol. 28), which was an action of trespass by the sheriff against the landlord for distraining goods previously seized under a fi. fa., it appeared that the sheriff's officer had gone to the house, and, after giving notice to the debtor of the writ, laid his hand on the table, saying, "I take this table," locked up his warrant in the drawer, took the key, and went away, leaving no one in possession. Lord Ellenborough said, "The question here is whether by quitting the premises after the seizure, and leaving no one in charge of the goods, he did not relinquish the possession." "In this case, what is there to show a continuance of the possession after the officer who made the seizure withdrew?" But, even if possession had not been abandoned *in the present case, the question still remains, whether the re-entry might be [*631] forcibly made. If the landlord could not break the outer door for the purpose of making the distress (and in *Brown v. Glenn*, 16 Q. B. 254 (E. C. L. R. vol. 71), it was held that he could not break open even the door of a stable not within the curtilage), it is difficult to see how he, or the man in possession (who could have no greater power than the landlord), could break open the outer door for the purpose of regaining possession of the goods distrained.

WIGHTMAN, J.—I am of opinion that the nonsuit was right. It was decided in *Swann v. The Earl of Falmouth*, 8 B. & C. 456 (E. C. L. R. vol. 15), that the quitting possession of goods, by the landlord,

after he had distrained them, was not necessarily an abandonment of the distress. In the present case there was no evidence of an abandonment, but the contrary. The man quitted, for a short time, the house in which the goods were, but clearly had no intention of abandoning them. On his return, he found the door locked against him; that placed him in the same position as if he had been forcibly ejected from the house, and therefore, as was held in *Eagleton v. Gutteridge*, 11 M. & W. 465,† gave him the right to break open the outer door, if necessary, to regain possession.

CROMPTON, J.—If the question were, whether there was a strict necessity for the man in possession leaving the house, the case, perhaps, would not have been properly put to the jury. But I think my brother Blackburn was right in acting on the authority of *Swann v. The Earl of Falmouth*. According to that case, what *was done *632] by the man in possession, even if not a matter of strict necessity, was not necessarily an abandonment of the distress: and, when it was once admitted that there was no evidence of abandonment, the plaintiff's case was at an end. During the temporary absence of the man in possession, the goods remained in the custody of the law; and, on his being forcibly kept out, which amounted to the same thing as his being forcibly turned out, he was justified, as was laid down in *Eagleton v. Gutteridge*, 11 M. & W. 465,† in breaking open the door in the exercise of his right, not to retake (for he had not abandoned), but to retain possession of the goods distrained.

BLACKBURN, J.—I also am of opinion that the nonsuit was right. There was evidence to go to the jury that the man in possession went out of the house for a purpose of his own, perhaps not a necessary one, and that he found the door locked against him on his return. I directed the jury, first, that, if he went out with the intention of returning, the distress had not been abandoned in point of law; and I directed them, secondly, that, in such case, he was justified in using force, if necessary, for the purpose of re-entering. The counsel for the plaintiff, upon this, elected to be nonsuited. *Eagleton v. Gutteridge* is a conclusive authority that the person in possession, if kept by force from the actual possession of goods distrained and in his constructive possession, has a right to use force for the purpose of re-entering upon such actual possession. Rule discharged.

*633] *ALCOCK and Others v. WILSHAW. Feb. 14.

Where the defendant in ejectment appears to defend for the whole of the land mentioned in the writ, and the plaintiff at the trial proves his title to the possession of part only of the land, the verdict is not to be entered in a general form for the plaintiff, but for the part only of the land as to which he succeeds; according to sect. 189 of The Common Law Procedure Act, 1853, and Schedule (A) to that Act, Form No. 17.

EJECTMENT. Writ dated 4th April, 1859, and directed "to James Wilshaw" (defendant) "and all persons entitled to defend the possession of a messuage or tenement, farm, lands, and premises, with the appurtenances, situate at Southlow, in the parish of Cheddleton, in the county of Stafford, to the possession of which the plaintiffs, or

some or one of them, claim to be entitled, and to eject all others." The defendant, on 11th April, appeared to the writ, and defended "for the whole of the land therein mentioned."

At the trial, before Willes, J., at the Staffordshire Summer Assizes, 1859, it appeared, from the opening of the plaintiff's counsel, that the defendant was the tenant of a farm, consisting of a farm-house, and buildings and land, situate as described in the writ, of which the plaintiffs had become landlords by purchase; and the plaintiffs gave the defendant, in September, 1858, due notice to quit on 25th March, 1859: on which day the defendant gave up the chief part of the land, but claimed, under a custom of the country, to retain possession of the house and stables, and a piece of land, called Boosey Pasture, till old May Day, 12th May, 1859. The writ was accordingly issued on 4th April, and, on 21st April, the house, stables, and piece of land, were also given up by the defendant to the plaintiffs.

On these facts, which were admitted on both sides, the learned Judge directed a general verdict for the *plaintiffs, and refused to try the question as to the custom of the country, as being [*634 immaterial.

Phipson, in last Michaelmas Term, obtained a rule calling on the plaintiffs to show cause why there should not be a new trial as for a misdirection by the learned Judge; on the grounds, first, that the action must be considered to have been brought for the possession of the premises of which the defendant was in possession at the date of the writ, and that it was not necessary for the defendant to limit his defence to that part; and, secondly, that, even if otherwise, the defendant was entitled to have the cause tried, in order to show, if he was able, that he was entitled, at the date of the writ, to the possession of part of the premises; and that in such case he would be entitled to the costs of his defence as to the part for which he succeeded, and that the learned Judge had no right to direct a general verdict for the plaintiffs. He cited *Doe d. Bowman v. Lewis*, 13 M. & W. 241.†

Scotland and *H. Matthews* now showed cause.—Under the procedure in ejectment, as now regulated by the Common Law Procedure Act, 1852,(a) the plaintiffs were entitled to have the verdict entered generally for them; the defendant having entered an appearance and defended for the whole of the land, and having admitted the title of the plaintiffs as to part. The case is analogous to that under the old practice, where the defendant in ejectment had entered into the ordinary general consent-rule; after which the plaintiff was entitled, if he succeeded as to any part of the premises, to a general verdict, taking out execution for more at his peril: *Doe d. *Davenport v. Rhodes*, 11 M. & W. 600.† Lord Abinger, C. B., there [*635 pointed out that if a defendant wished to entitle himself to the costs as to the part of the premises with respect to which he succeeded, his proper course was to state specifically in the consent-rule for what part he meant to defend. And his Lordship distinguished *Doe d. Errington v. Errington*, 4 Dow. 602, on the ground that the judgment of Coleridge, J., in that case assumed that the verdict had been entered distributively by arrangement between the parties. In *Doe d. Bow-*

(a) Stat. 15 & 16 Vict. c. 76.

man v. Lewis, 13 M. & W. 241,† which was relied on by the other side when the rule was moved, the defendant had given the lessors of the plaintiff specific notice, by the consent-rule, for what premises he defended. That decision, therefore, does not overrule Doe d. Davenport v. Rhodes, in which the consent-rule was general. In the present case, the defendant ought to have given notice confining the defence to part of the premises, in pursuance of sect. 174 of the Common Law Procedure Act, 1852. [HILL, J.—By sect. 180, the issue in ejectment is to be tried in the same manner as in other actions, and “the question at the trial” is to “be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; and the entry of the verdict may be made in the form contained in the schedule (A)” “marked No. 17, or to the like effect, with such modifications as may be necessary to meet the facts.” Does not this section provide for the entry of the verdict, in every case, according to the facts? Such seems to have been the *opinion of this Court *636] in *Elliss v. Elliss*, E. B. & E. 81 (E. C. L. R. vol. 96).] Sect. 180 must be read in connection with sect. 174, and cannot apply where the defendant has entered a general appearance. [CROMPTON, J.—Why should not the defendant be taken to have appeared to defend for the whole and also for each specific part of the premises? From *Phythian v. White*, 1 M. & W. 216,† to *Traherne v. Gardiner*, 8 E. & B. 161 (E. C. L. R. vol. 92), the Courts have always construed distributively all pleadings that would possibly admit of such a construction. And sect. 75 of The Common Law Procedure Act, 1852, now requires them to do so. An appearance in ejectment is certainly not a pleading, but it is, under the new practice, analogous to the plea of Not guilty under the old; which, in *Doe d. Bowman v. Lewis*, 13 M. & W. 241,† was held to be distributable.] Sect. 75 does not apply to ejectment.

J. J. Powell, contra, was not heard.

PER CURIAM.(a)—For the present purpose, it must be assumed that the defendant could have succeeded in disproving the plaintiff's right to the possession of part of the premises in question. The rule, therefore, must be absolute for a new trial, unless the plaintiffs consent to enter the verdict for the part to which they are entitled, according to sect. 180 of The Common Law Procedure Act, 1852, and the form No. 17 in Schedule (A.)

Rule absolute accordingly.

(a) *Wightman, Crompton, and Hill, Js.*

***BEECHEY v. BROWN.** *Feb. 15.*

[*637]

[Reported, E. B. & E. 796 (E. C. L. R. vol. 96).]

In the Arbitration between MARSACK and WEBBER. *Feb. 25.*

The declaration in an action of M. v. W. contained two counts: the first, on an agreement by W. to sell a surgeon's business to M., alleging three breaches; the second, for fraud by W. in inducing M. to enter into the agreement. By the pleas, W. denied the first two breaches in the first count, paid money into Court as to the third breach, and pleaded Not guilty to the second count. After issue joined on the pleas, the parties, by agreement, referred all disputes, differences, and accounts between them to an arbitrator; the costs of the reference and award, including such costs of the cause as might be taxed, to abide the event of the award.

The disputes, differences, and accounts referred, all arose out of the agreement sued on in the first count of the declaration.

The arbitrator awarded in favour of W. in respect of the charges of fraud; in favour of M. on the accounts: awarding that W. should pay M. a certain sum in respect of the latter, and that, except as to the matters decided, neither party had any claim against the other.

Held that, upon this finding, neither party was entitled to any costs: Wightman, Crompton, and Hill, Js., holding that where two parties agree to refer several disputes to arbitration, and use the words "the costs of the reference and award are to abide the event of the award," the costs are not distributable, but there must be a general event of the award altogether in favour of one party, to entitle him to costs; Cockburn, C. J., agreeing in the decision, on the ground that all the matters referred had arisen out of one dispute with respect to one original subject-matter; but declining to decide whether or not, where the matters referred are clearly distinct and separate, the "event" of the award may be construed as "events," so as to make the costs distributable according to the arbitrator's finding.

NEEDHAM, in Easter Term, 1859, obtained a rule (which was enlarged from Term to Term till Hilary Term, 1860), on behalf of William Webber, calling upon Blackall Marsack to show cause "why one of the Masters of this Court should not be at liberty to tax the defendant's costs in an action of Marsack v. Webber, and also the costs in the issues and matters found by the arbitrator in his favour in the reference and award."

*It appeared from the affidavits on either side, that Webber and Marsack were surgeons, and that, on 16th October, 1855, they entered into an agreement, by which, after reciting that Webber had practised for several years as a surgeon, and had established a considerable practice in Norwich, and that Marsack was desirous of establishing himself there as a surgeon, it was, so far as is now material, agreed: First, that Webber should introduce Marsack to his patients as far as possible, and that, in consideration of such introduction, and of the services to be rendered by Webber to Marsack, the latter should pay to Webber, within one week from that date, 350*l.*, and should, in addition, allow him such share in the net profits of the two in their profession as thereafter mentioned. Third, that Webber should render to Marsack his best advice and assistance in all matters connected with his profession. Fourth, that Marsack should keep a regular account of all receipts and payments in their professional practice, and submit it at all reasonable times to Webber, on request. Eighth, that Marsack should, quarterly, pay to Webber, or account to him for, one moiety of the net profits. Eleventh, that

if Webber should discontinue his advice and retire from business, Marsack should, within three months of notice from him to that effect, pay to him the further sum of 250*l*. Lastly, that, in case of any dispute or difference touching that agreement or the subject-matter of it, such dispute or difference should be referred to two persons, one to be chosen by each party, or, in case the said arbitrators could not agree, to an umpire, and that the decision of such arbitrators or umpire should be final.

Disputes subsequently arose between the parties, and, in June, 1857, Marsack brought an action against Webber *in the Court
*639] of Exchequer. In the first count of the declaration, after setting out the above agreement, the plaintiff alleged, as breaches, that the defendant made default in introducing the plaintiff to the defendant's patients, and in rendering to him his best assistance and advice; and that, although divers disputes and differences had arisen between them touching the agreement and the subject-matter thereof, and although the plaintiff was ready and willing to refer the same to arbitration, the defendant would not so refer them, or choose an arbitrator, &c.; contrary to the agreement: whereby the defendant was injured in his practice and put to expense in settling the disputes otherwise than by arbitration. The second count alleged that the defendant "falsely and maliciously represented to the plaintiff that certain papers enclosed by the defendant in a certain letter would more fully convey to the plaintiff the defendant's position in the way of his profession of a surgeon than the defendant had time to do in writing; and that his (the defendant's) business produced about 1200*l*. per annum; and that he (the defendant) could give the plaintiff in the way of his profession as a surgeon first-rate introductions; and that he (the defendant) had in the way of his profession his full share of consultations, and that he attended in the way of his business the principal families in Norwich and the neighbourhood, and that his practice was among the best families in Norfolk and the adjoining counties; and the defendant falsely and maliciously and deceitfully concealed from the plaintiff that an hospital, to which the defendant was in the way of his profession attached as surgeon, was then in a failing condition and likely to be discontinued." The count then
*640] averred that all the above representations *were untrue, and that the defendant knew of their untruth, and knew of the facts so concealed by him from the plaintiff. It then concluded thus. "By means whereof the plaintiff was induced to enter into the said agreement of 16th October, 1855, in the first count set forth, and to pay to the defendant the said sum of 350*l*. in that agreement mentioned, and to become liable to pay the said further sum of 250*l*," and to take a larger house than was suitable for carrying on the whole of the business, &c.

Pleas. 1. To so much of the first count as alleged that the defendant made default in introducing the plaintiff to the defendant's patients; That the defendant did not make the alleged default. 2. To so much of the first count as alleged that the defendant made default in rendering to the plaintiff the defendant's best assistance and advice; That the defendant did not make the alleged default. 3. As to the breach lastly alleged in the first count; Payment of 40*s*. into Court

4. To the second count; Not guilty. Issues were joined on the 1st, 2d, and 4th pleas, and to the third plea there was a replication of damages ultra the 40s.

Issue was joined on the replication on 16th July, 1857. On 25th July, 1857, an agreement to refer the action was entered into, and the action was, on the same day, discontinued. The agreement of reference was dated 28th July, 1857, and was, so far as is material, as follows. "This agreement, made 28th July, 1857, between B. Marsack, of Norwich, surgeon, and W. Webber, of the same city, surgeon. Whereas, by agreement bearing date 16th October, 1855, the above-named parties agreed to carry on business as surgeons in the said city; and whereas certain disputes, differences, and accounts have *arisen respecting the same; and whereas it has been agreed [*641 that all differences and accounts between the said parties shall be referred to the arbitration of" (here two persons were named, one appointed by each side, and it was recited that in case of a difference between them it was agreed that the reference should be to an umpire appointed by them). "Now, therefore, in order to avoid all litigation, the said B. Marsack, for himself, his heirs, executors, and administrators, and the said W. Webber, for himself, his heirs, executors, and administrators, do hereby agree that the said disputes, differences, and accounts shall be, and the same are accordingly, referred to the award, order, and arbitration of the said," &c., "so that the said," &c., "shall publish their award in writing, of and concerning the matters referred, on or before" a specified day. "And it is hereby further agreed that the said parties shall abide by the said award," &c., "and the costs of and incident to this reference, and of the award of the said arbitrators or umpire, as the case may be, including therein such costs as may be taxed by the proper officer of the Court, of a certain action brought by the said B. Marsack against the said W. Webber in the Court of Exchequer of Pleas, including the cost of summoning a special jury (if any), shall abide the event of the said arbitration or umpirage." Power was given to make the agreement a rule of this Court, and it was also declared and agreed "that the above-named action shall, for the purposes of this reference, be discontinued, and it is discontinued accordingly."

On 10th October, 1857, an arbitrator was appointed, pursuant to The Common Law Procedure Act, 1854. At the several meetings held before the arbitrator, charges *were brought before him by [*642 Marsack against Webber, which were the same as those mentioned in the above pleadings, and a copy of the declaration was delivered by Marsack to the arbitrator as particulars of such charges; but the action itself was not brought before the arbitrator as a matter to be awarded on: accounts on either side were also gone into, arising out of the agreement of 16th October, 1855. The arbitrator made his award on 1st March, 1859, and thereby, after reciting the above agreement of reference, he proceeded to make his award "of and concerning the disputes, differences, and accounts so referred, in manner following. As to the charges made by the said B. Marsack against the said W. Webber, that the said W. Webber falsely and maliciously represented" [reciting the charges in the words used in the second count], "I find that the said W. Webber is not guilty of the said

charges, or of any of them, or of any part thereof; and as to the said accounts brought before me, I find and award that the said W. Webber was and is indebted to the said B. Marsack, in respect thereof, in the sum of 156*l.* 18*s.* and no more; and I award and direct that the said W. Webber do pay the said sum of 156*l.* 18*s.* to the said B. Marsack. And I find and award that, except as aforesaid, the said B. Marsack has no claim or demand whatever against the said W. Webber in respect of the disputes, accounts, and matters in difference brought before me, or any of them, and I find and award that the said W. Webber has no claim or demand whatever against the said B. Marsack in respect of the said disputes, accounts, and matters in difference, or of any part thereof."

*643] The Master having refused to tax either party any *costs without a direction from the Court, the present rule was obtained; the agreement of reference having been made a rule of Court.

Hawkins, in last Hilary Term, showed cause.(a.)—There has been no such event of the arbitration as to entitle Webber to costs. The cases are conclusive against his right to them. In *Boodle v. Davies*, 8 A. & E. 200 (E. C. L. R. vol. 30), a cause and all matters in difference were referred to arbitration, with a direction that the costs of the action, reference, and award, should abide the event of the award. The arbitrator having awarded some things in favour of each party, this Court, being unable to say, upon the whole, that the award was in favour of either, held that no order could be made as to any part of the costs; although the action was in trespass and the arbitrator had found that trespasses had been committed. *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), s. c. 2 Sc. 470, is to the same effect. *Reeves v. McGregor*, 9 A. & E. 576 (E. C. L. R. vol. 36), shows that the event of an award means the ultimate and general event, not each particular part; and *Gribble v. Buchanan*, 18 C. B. 691 (E. C. L. R. vol. 86), and *Reynolds v. Harris*, 3 C. B. N. S. 267 (E. C. L. R. vol. 91), are recent decisions to the effect that, on a reference like that in the present case, each party to the reference must pay his own costs unless the general event of the award is in favour of one of them. In the present case, the costs of the action of *Marsack v. Webber* were, by the terms of the submission, to be considered as part of the *644] costs of the reference, and the whole costs were to abide *the event of the award. That event having been partly in favour of each party, no costs can be given to either.

Lush and Needham, contra.—Webber is entitled to the costs incident to so much of the award as is in his favour. There is no absolute rule of law which requires the Court to interpret the word "event" as meaning one absolute general event. The question is one of construction, and depends upon the intention of the parties as it is to be collected from the agreement of reference. In the present case, there were two subject-matters submitted to arbitration, requiring a distinct finding as to each; namely, the charge of fraud, and the question of account. Upon one of these, the charge of fraud, the arbitrator has found in favour of Webber. If Webber is not entitled to part of the costs, Marsack practically is entitled to the whole: for by the award Webber takes nothing, but merely escapes from the action; whereas

(a) Thursday, January 12th. Before Cockburn, C. J., Wightman, Crompton, and Hill, J.

Marsack has the award, as to the money, in his favour. The cases cited on the other side are not conclusive of the present. *Boodle v. Davies*, 3 A. & E. 200 (E. C. L. R. vol. 30), and *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), s. c. 2 Sc. 470, are the decisions on which all the others were founded. In *Boodle v. Davies* the event of the award did not determine the action, but merely directed the extent to which each party was thereafter to enjoy the locus in quo for a trespass upon which the action was brought. So, in *Yates v. Knight*, the event of the award was not the event which the parties could be said to have had in contemplation when they entered into the submission. In *Gribble v. Buchanan*, 18 C. B. 691 (E. C. L. R. vol. 86), the parties had counter claims against each other; and, by the event of *the award, each party succeeded on his [*645 claim. Their intention, in going to a reference, probably was that, unless one of them succeeded entirely and the other failed entirely, neither should have any costs; and the decision of the Court rightly gave effect to that intention. Unless, however, such was the ground of that decision, it ought not to be upheld; for it amounted to no more than a hasty adoption by the Court of a passage in *Russell on Awards*, p. 380 (ed. 2), founded on *Boodle v. Davies*, 3 A. & E. 200 (E. C. L. R. vol. 30) and *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), s. c. 2 Sc. 470, which, it is submitted, do not bear it out. [HILL, J.—In *Gribble v. Buchanan*, 18 C. B. 691 (E. C. L. R. vol. 86), it was unsuccessfully urged for the plaintiff that he was entitled at all events to so much of the costs of the reference as related to the action; he having succeeded as to that.] In *Reeves v. MacGregor*, 9 A. & E. 576 (E. C. L. R. vol. 36), the question was only whether the arbitrator had exceeded his authority; and the point decided was that, in ordering that the plaintiffs should be restrained on equitable grounds from proceeding to recover all that which, on legal grounds, they were entitled to, he had only exercised a power necessarily resulting from the nature of the reference, although he had in so doing indirectly exercised a jurisdiction over the costs of an action at law, which the plaintiffs had brought; which costs were directed by the reference to abide the event of the award. In *Matlock Gas Company v. Peters*, 25 L. J. N. S. Q. B. 273, Lord Campbell, C. J., said: "Where a cause is referred, *prima facie* the event of the award must mean the event of the action as decided by the award." [HILL, J.—In the report of that case in *Ellis v. Blackburn* (6 E. & B. 215, 217 (E. C. L. R. vol. 88),) that passage does not occur; but Lord *Campbell is reported to have said: "The submission here [*646 empowers the arbitrator to order a verdict or nonsuit; and the award expressly directs a verdict for the plaintiffs; and that, as to the action, is the event of the award."] In *Traherne v. Gardner*, 8 E. & B. 161 (E. C. L. R. vol. 88), this Court treated issues as distributive in order to give the defendant the costs of his successful defence to a distinct part of the plaintiff's claim. A fortiori, it is fair and equitable that upon a reference of an action like the present, the declaration in which contained distinct counts, the costs should be distributable according to the matters on which each party succeeds. It cannot have been the intention of the parties that the defendant should not have the costs of rebutting the charge of fraud unless he also suc-

ceeded in repelling the plaintiff's money claim. In *Reynolds v. Harris*, 3 C. B. N. S. 267 (E. C. L. R. vol. 91), the reference was of the cause only, not of the cause and all matters in difference; and the Court decided that where, upon such a reference, the costs are to abide the event of the award, the event of the award means the event of the cause as decided by the award. That decision, as far as it goes, is rather in favour of than against the present defendant.

Cur. adv. vult.

WIGHTMAN, J., now delivered the judgment of himself, CROMPTON, and HILL, Js.

This was a rule obtained on behalf of William Webber, calling on Blackall Marsack to show cause why the Master should not tax the defendant's costs in an action *in the Exchequer, of Marsack *647] v. Webber, and the costs of the matters found in his favour by the arbitrator, on a reference and award.

It appears that Marsack brought an action in the Exchequer against Webber. The declaration contained two counts: the first, on an agreement for the sale of a surgeon's business, alleging three breaches: the second, for fraud in inducing the plaintiff to enter into the agreement. The defendant pleaded, denying the first two breaches, and paying 40s. into Court as to the third breach; and he pleaded not guilty to the count for fraud. Issue was joined on 16th July, 1857, and on the 25th of the same month the parties agreed to stay all further proceedings in the action and to refer all matters in dispute to arbitration. By an agreement made on the last-mentioned day, after reciting the fact of the agreement for the sale of a surgeon's business, and "that certain disputes, differences, and accounts had arisen respecting the same," and that it had been agreed to refer all differences and accounts to arbitration, the parties in the usual form agree to refer all disputes to two arbitrators or their umpire, with the following provisions as to costs: "the costs of and incident to the reference, and of the award of the said arbitrators or umpire as the case may be, including therein such costs as may be taxed by the proper officer of the Court, of a certain action brought by the said Blackall Marsack against the said William Webber, in the Court of Exchequer of Pleas, including the costs of summoning a special jury (if any), shall abide the event of the said award or umpirage." The agreement also contained a clause that it was agreed that, for the purposes of that refer- *648] ence, the said action should be discontinued, and *that it was discontinued accordingly. It further appears from the affidavits that, before the arbitrator, Marsack put in the declaration in the action, as containing a statement of the matters in respect of which he claimed damages, and that he also claimed a money balance as due to him on certain accounts. The umpire made his umpirage, awarding in favour of Webber on the claim made in respect of fraud; in favour of Marsack on the accounts, awarding him 150l. 10s. in respect thereof; and that, except as to those matters, neither party had any claim against the other. It was argued before us, on behalf of Webber, that, as the award was substantially in his favour as to those matters which had been involved in the action, he was entitled to the costs of so much of the reference and award, including the costs of the action, as related to those matters. It was contended, in answer, on behalf of Marsack,

that the costs of the reference and award were not distributable, and that, as neither party succeeded on the award, it being partly in favour of one and partly in favour of the other, there had been no general event of the award in favour of either party, entitling either to costs. In our judgment, the latter is the correct view. The question really turns upon the construction of the agreement of reference, the words of which have been already read. The costs of the action, as distinguished from the costs of the reference, have ceased to exist. But the parties agree that, if either party shall be entitled to the costs of the reference, the costs of the action are to be regarded as part of the costs of the reference. The matter to be decided, then, resolves itself into this: When two parties agree to refer several disputes to arbitration, and use the words "the costs of the reference and award are to abide the event of the award," are the costs distributable, [*649 or must there be a general event of the award altogether in favour of one party, to entitle him to costs? The case of *Boodle v. Davies*, 3 A. & E. 200 (E. C. L. R. vol. 30), and the judgment of Pateson, J., in *Yates v. Knight*, 2 Bing. N. C. 277 (E. C. L. R. vol. 29), s. c. 2 Sc. 470, are strong authorities in favour of the latter view. For, if the costs were distributable, the arbitrator would be bound to find separately on each separate matter, so as to show what his decision was in respect thereof; otherwise, his award would show no distinct event for each subject-matter, and would, therefore, be bad, as it would be left uncertain who should have the costs: In re *Leeming and Fearnley*, 5 B. & Ad. 403 (E. C. L. R. vol. 27). In *Boodle v. Davies* and *Yates v. Knight* the costs of action and costs of reference and award were to abide the event of the award. If that provision, so far as it relates to the costs of the action, meant the event of the award as to the action, it was the express duty of the arbitrator in such case so to have disposed of the matters in difference in the action as to produce an event which would determine the costs. But this Court and the Court of Common Pleas decided that the awards in those cases were good, in respect of the objection mentioned; on the ground that, in those cases, the event of the award meant the general event, and that as some matters were decided in favour of each party no costs were payable. It is further to be noticed, that this is the first case in which it has ever been insisted that the costs of a reference are distributable, where general words are used in the submission stating that they are to abide the event of the award. It was urged before us, in argument, that it would be more equitable that *costs in such a reference should be distributable according to the [*650 matters on which each party succeeds. That, however, is not the question before us; we have simply to determine what is the agreement which the parties have made, according to the language which they have used, and the light thrown on that language by decided cases. If parties who refer desire to make any particular provision as to costs, they may do so, using apt language for the purpose. We are therefore of opinion that the rule obtained by Mr. *Lush* must be discharged.

COCKBURN, C. J., then said. I would add one word to that judgment, namely, that I concur in the conclusion which my learned Brothers have come to with reference to this particular case. But I

wish to guard myself against being taken to hold that, where distinct, separate, substantive matters in difference are referred to arbitration, with a provision that the costs shall abide the event of the award, and some of those matters are decided in favour of one party and some in favour of the other, the word "event" must there be taken to be applicable only to one general event, so as to prevent either party from obtaining costs. It is not necessary to decide that question in the present case, as it appears to be quite clear that, although in point of form various subject-matters of difference were brought before the arbitrators, yet they all arose out of one dispute and contention, with reference to one original subject-matter; and therefore, the parties must be bound by the condition that the costs shall abide the event of the award. Some of the matters in dispute were awarded in favour of one party and some in favour of the other party, so that it *651] may well be that there is no event upon which *costs could be payable by either party. But where the matters referred are clearly distinct and separate, it seems to me that it would be fraught with very great inconvenience and injustice to hold that the word "event" may not be construed in the larger sense of "events" so that the costs may be distributed according to the decision of the arbitrator upon the different matters brought under his notice. It is not necessary to decide that point at present. I reserve my opinion upon it, but I desire that it may be understood that, in concurring in the decision in this case, I do not decide that question.

Rule discharged, without costs.

The QUEEN, on the Prosecution of The STOKE, FENTON, and LONGTON GAS COMPANY, v. The LONGTON GAS COMPANY (LIMITED), and Others. Feb. 25.

It is an indictable nuisance to obstruct or to employ others to obstruct a public highway or footway, by placing earth and bricks thereon, taking up the pavement and opening trenches for the purpose of laying down service pipes for the supply of gas from public mains to private houses, unless those who do or authorize such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of the houses as an exercise of the right of every householder to make such a temporary obstruction of a highway or footway as may be necessarily incident to the enjoyment of his property.

THIS was an indictment for a nuisance to the foot-paths and streets in the town of Longton, in the county of Stafford. The first count alleged that defendants, on 9th August, 1858, in a certain common and public footway, called High Street, Longton, situate in the parish of Stoke-upon-Trent, in the county of Stafford, being the Queen's common highway, used for all her subjects to pass and repass, on foot, in *652] and along the same at *their free will and pleasure, unlawfully and injuriously did dig up the pavements of the said footway, and did put and place bricks, earth, and rubbish in and upon the said footway, and dug and made therein certain holes and trenches of the respective widths of two feet, and continued the same trenches open, to wit, for twelve hours, and laid and placed down iron pipes in the same, whereby the said highway then and for and during all the

time aforesaid was obstructed and encumbered, to the great damage and common nuisance of all Her Majesty's liege subjects.

The second count charged that defendants, on 16th August, 1858, in the same manner and for the same period, obstructed and encumbered a certain street, called Russell Street, Longton, by digging up the said street and placing earth and rubbish in and upon the same, and making and continuing divers holes and trenches therein, of the width and for the time above mentioned.

The third count charged that defendants, on 20th August, 1858, in the same manner and for the same period, obstructed and encumbered a public and common highway, called Sutherland Road, Longton, by digging up the pavement and roadway of the said highway, and placing thereon bricks, earth, and rubbish, and making therein divers holes and trenches of the width and for the time above mentioned.

The fourth count charged that defendants, on 24th August, 1858, obstructed and encumbered a certain highway, called Middle Cross Street, Longton, in the same manner and for the same period as alleged in the third count.

*The fifth count charged that defendants, on 23d September, 1858, obstructed and encumbered a certain public footway, [*653 called King Street, Longton, by digging up the pavement of the same and placing bricks, earth, and rubbish thereon, and making and continuing therein divers holes and trenches of the width, and for the same period of twelve hours, before mentioned.

Plea: Not guilty. Issue thereon. The case came on for trial before Crompton, J., at the last Stafford Summer Assizes, when it was arranged that a verdict of Not guilty should be entered as respected some of the defendants, and a verdict of Guilty as against the defendants the gas Company and all the other defendants, subject to the opinion of the Court upon a case, which, so far as is material, was as follows.

The town of Longton is one of the towns situate within the Staffordshire Potteries district. It contains about 15,000 inhabitants, and is two miles distant from the town of Stoke-upon-Trent, where the gas works of The Stoke, Fenton and Longton Gas Company, hereinafter mentioned, are situate. Before the passing of stat. 2 & 3 Vict. c. xliv., (a) hereinafter referred to, the streets, lanes, roads, and public passages and places within or around the said town were not lighted, nor were there any public lamps within or around the said town. By the said Act, entitled "An Act for establishing an effective police in places within or adjoining to the district called the Staffordshire Potteries, and for improving and cleansing the same, and better lighting parts thereof," the said town of Longton, and the several other towns, townships, or places mentioned in the said *Act were, for the [*654 purposes of the Act, divided into four separate districts, called respectively, the Longton District, the Fenton District, the Stoke District, and the Trentham District; the Longton District being formed of the said town of Longton, which comprises the township of Longton and the township of Lane End, mentioned in the said Act: and each of the said districts was placed under the government and directions of a separate and distinct body of Commissioners, called

(a) Local and personal, public.

the Commissioners of Police of the respective districts. Sect. 68 of the Act empowers the Commissioners of the Longton District, of the Fenton District, and of the Stoke District, respectively, "to light or cause to be lighted the streets, roads, lanes, and other public passages and places within their said respective districts;" and "to set up or affix, or cause to be set up or affixed, such lamps, irons, and lamp-posts, or other posts, and all such other materials and things as they may judge necessary to be set up or affixed in such streets," &c., "or any of them, and upon or against the walls, palisadoes, or iron rail-fences, or any other part of any house, tenements, buildings, or enclosures, or in such other manner as they respectively shall think proper," "doing no damage or injury to any house, building, tenement, or premises; and also to cause" "lamps" "to be provided and affixed and put upon such lamp-irons or lamp-posts, as they shall think necessary, for lighting all or any of the streets, lanes, roads, and other public passages and places within their said respective districts, and to cause the same to be lighted with gas, oil, or otherwise, at such times or seasons as they shall think necessary; and" "to contract and agree with any Company or Companies of proprietors, or other person *655] *or persons, to light the said streets," &c., "with gas, oil, or otherwise, in such manner, and upon such terms, conditions, and agreements, as such Commissioners respectively, from time to time, shall think proper; and it shall be lawful for any such Company or Companies, or person or persons, to execute any of the powers by this Act given to such Commissioners for the purposes of such lighting as shall be expressed in any such contract or contracts: Provided always, that it shall not be lawful for such Commissioners or for any person or persons with whom they may contract for lighting any such streets," &c., "to carry, lay, place, or fix any lamp-iron, or lamp, or any pipe or other matter or thing, for lighting all or any such streets," &c., "with gas, oil, or otherwise, into or through or against or on any dwelling-house or private building, or yard or curtilage to any house or other private building or premises, or so to continue the same without the consent in writing of the owner or occupier thereof." And, by sect. 69, "in case it shall be determined to light all or any of the said streets, lanes, roads, and other public passages and places with gas, oil, or otherwise;" the Commissioners or the person or persons with whom they contract, or agree as aforesaid, may "direct the digging and breaking up the soil or pavement of any of the footways or carriageways of any of the streets, lanes, roads, and other public passages and places within their said respective districts, in order and for the purpose of sinking, constructing, laying, and fixing pipes, stopcocks, plugs, branches, and all other works and apparatus necessary for such lighting with gas, and from time to time to direct" the same "to be taken up, repaired, altered, renewed, or relaid, as may *656] be needful and expedient, *making good and restoring to its former state and condition all such soil or pavement so broken up." By sect. 78 the Commissioners are authorized "from time to time to contract and agree with any body politic or corporate, or Company of proprietors, or any person or persons whomsoever, for lighting the several streets, lanes, roads, and other public passages and places within their said respective districts, or any of them, or for fur-

ishing providing, and erecting or placing lamp-posts, lamps, pipes, and other matters and things, and for doing any works necessary for carrying into execution the purposes of this Act, so far as respects the lighting such streets, lanes, roads, and other public passages and places, or any of them." The said Act, by sect. 83, further provides for defraying from time to time the cost and expenses of lighting the said Longton, Fenton, and Stoke districts respectively, by a just and equal pound-rate or assessment, not exceeding 8d. in the pound in any one year, to be made and levied by the said Commissioners, under the name of "The Public Lighting Rate," upon all persons inhabiting, using, or occupying any house, shop, &c., within their said respective districts. And, by sect. 100, it is provided that all the moneys raised under the name of The Public Lighting Rate shall be vested in the Commissioners of the particular district, and be applied and disposed of for defraying the costs, charges, and expenses in, for, and about the public lighting of the several streets, lanes, roads, and other public passages and places in the district within which the same shall be raised. The Act contains provisions respecting the removal of nuisances and obstructions. Sect. 47 empowers the Commissioners to cause all encroachments and obstructions on *the footways and [*657 carriageways in the streets, &c., to be removed, and for such purpose to give twenty-one days' notice to occupiers and tenants to remove projections. Sect. 51 empowers them to make sewers, tunnels, gutters, drains, &c., in the streets, &c., for draining and cleansing the districts. Sect. 66 (inter alia) imposes a penalty on any person who wilfully impedes or obstructs the free passage of any person upon or along or in any footpath, footway, or carriageway, or the free passage of any horse, beast, or carriage along any carriageway: or commits or causes any other nuisance or annoyance whatever: and it empowers any constable or other peace officer, or any Commissioner of the district, or any officer appointed under the Act, to take away and remove any of the thereinbefore mentioned obstructions, nuisances, or annoyances, in case the party occasioning the same shall not forthwith remove the same within a reasonable time after being required so to do by any person whomsoever.

Soon after the passing of the said Act, a Company called "The Stoke, Fenton, and Longton Gas Company," was established by a deed of settlement or copartnership, for the purpose of supplying with gas the said towns of Stoke-upon-Trent, Fenton, and Longton, and the places adjacent; and the said Company thereupon erected gas-works, and laid down their mains and pipes for public and private lighting, through the streets and footways within the town of Longton and the places adjacent; and since the said Company was established, and until 1st September, 1858, the Commissioners of the Longton district have from time to time (except during the winter of 1849, when the public lamps in Longton were lighted with naphtha), duly contracted with the said *Company, under the powers of their Act, for the [*658 lighting of the streets, roads, lanes, and other public passages and places within their said district, including the town of Longton; and the said Company have, during all the said time (except as aforesaid), continued to light the said streets, roads, lanes, and other public passages and places, and also private houses and buildings; and

the only authority which they had for breaking up the said streets and footways, and laying down the mains and pipes for the public or private lighting, was the permission given to them by the Longton Commissioners under the said Act.

On 14th June, 1858, an Act was passed (21 Vict. c. xl.(a) by which the persons forming the said Stoke, Fenton, and Longton Gas Company are incorporated by the name of "The Stoke, Fenton, and Longton Gas Company," for the purpose of making and supplying gas within the limits of the said Act of incorporation, which limits include the whole of the said Stoke, Fenton, and Longton districts respectively.

On 5th June, 1858, a Company was established under the Joint Stock Companies Act, 1856, Stat. 19 & 20 Vict. c. 47, by the name of "The Longton Gas Company (Limited)," for the manufacture and supply of gas within the Longton district; and, on or about 1st August, 1858, this Company began to erect their gas works.

The last contract for lighting the Longton district between "The Stoke, Fenton, and Longton Gas Company" and the Commissioners of that district terminated on 1st May, 1858; and at the annual *meeting *659] of the Commissioners of the Longton district held on 14th June, 1858, they rejected the tender of that Company for the renewal of the contract; and at such meeting the following resolution was carried by a majority of the Commissioners present: "That the Longton Commissioners agree to contract with The Longton Gas Company for the supply of gas to the public lamps for the term of three years, upon the same terms as they are now under by their contract with the Stoke, Fenton, and Longton Gas Company; and they agree to give the Longton Company all the powers they possess under their local Act for breaking up the streets and laying pipes within the Longton district." On 15th June, a contract or agreement to that effect between the Longton Company and the Commissioners was duly executed by the Commissioners and the Company; and by it the Commissioners contracted to give to the said Company the benefit and advantage of all and every power and powers which the Commissioners possessed, under or by virtue of the said local Act, for laying down and altering mains and service-pipes in the streets, roads, and other public places within the Longton district. (A copy of this contract accompanied and was to be referred to as part of the case.)

At the time of the passing of the said resolution of the Longton Commissioners of 14th June, 1858, The Longton Gas Company (Limited) had not commenced to lay any mains or pipes within the town of Longton. But, on 29th July, 1858, a meeting of the directors of that Company was duly held, for the purpose of making the necessary arrangements and contracts for the laying of mains and service pipes for the lighting of the streets and other public passages and places *660] within the town of *Longton; and at such meeting a resolution was duly passed "that William Moore's" (one of the defendants) "tender for excavating and paving be accepted, and a contract entered into with him, to be prepared by the solicitor and

(a) Local and personal, private. "For incorporating The Stoke, Fenton, and Longton Gas-light Company, and extending their powers, and for other purposes."

(b) Stat. 19 & 20 Vict. c. 47.

signed by the chairman on behalf of the Company." In pursuance of this resolution a contract in writing was, on 7th August, 1858, entered into and signed by the chairman of the directors of the said last-mentioned Company, on behalf of the Company and by the defendant, William Moore, the person usually employed in paving the streets; by which the said William Moore contracted to remove bricks and stones, and cut trenches of sufficient width and depth, and in the directions required for receiving the mains and service-pipes in and throughout the town of Longton: and, as the said mains and services were being laid by the said Longton Gas Company (Limited), immediately to fill in and pound the soil or earth so as to make the same again perfectly solid, and repair the footpaths, channels, and roads, and so as to reinstate the same in their former condition, and to the entire satisfaction of the said Longton Gas Company and the Board of Highways of Longton aforesaid: and also, immediately and without any delay whatever, to remove all surplus earth and rubbish left in filling in again the said trenches or repairing the said footpaths, channels, and roads, from and out of the said streets, roads, and ways of Longton aforesaid. And the said William Moore also contracted with the said Longton Gas Company (Limited) to do as little damage as might be to the streets, roads, and ways of Longton aforesaid, and the pavements and channels thereof, and as far as possible avoid injuring any gas or water pipes of other Companies, and creating or causing any nuisance or *annoyance whatever to the inhabitants [*661 of Longton, or others, in executing the said works. (A copy of this contract was annexed to and was to be referred to as part of the case.) Under this contract the laying of mains and pipes for the supply of gas within the said town of Longton by the said Longton Gas Company (Limited) commenced on 9th August, 1858, and, between that date and 23d September following, the alleged acts of nuisance charged in the several counts of the indictment were committed. The only acts done by Mr. Joseph Knight, one of the defendants against whom the verdict of Guilty was entered, were that he, being the owner and occupier of a house, contracted with the Company to have it lighted, and then told the Company's workmen to lay down the service-pipes for the purpose of connecting his house with the mains, which was accordingly done by the Company's workmen. Of the other defendants against whom the verdict of Guilty was entered, William Moore was the contractor with The Longton Gas Company (Limited), as before mentioned, and William Hunt was the manager of that Company, and the others were labourers and workmen employed by and acting under the orders and directions of the said William Moore as contractor with, or of the said William Hunt as manager of, the said Company. These defendants, on the said several days mentioned in the indictment (for the purpose of laying down mains and pipes for the public lighting of the town of Longton), dug and caused to be dug trenches in and along the footpaths and pavements on the side of the several streets and highways named in the counts of the indictment, and in these trenches the said mains were laid and covered in, and from the mains so laid small pipes for the supply of gas were carried to *the different public lamps and burners within the town of Longton, for the purpose of the public lighting of the said [*662

town. The defendants also, on the said several days, dug and caused to be dug a great many other trenches in different parts of the said streets and highways, for the purpose of laying service-pipes, in order to supply gas to private individuals, for the lighting of private houses and shops, and other private buildings and places. These trenches were dug from the said mains used for the public lighting of the town, in some cases across the footpath and pavement only, and in one case across the footpath and pavement and the public street or road, to the several private houses, shops, buildings, and places intended to be supplied with gas; and in the cross trenches so dug iron service-pipes, for conveying the gas to the said private houses and shops, buildings, and places, were laid and covered in. The digging of these cross trenches, and the laying of these service-pipes, were in no way necessary, required, or used for the public lighting of the streets, roads, lanes, and other public places under the contract before mentioned; although lights in the shops, factories, and houses at the sides of such streets, roads, lanes, and other passages and places, incidentally assist in lighting them. The digging of the cross trenches and laying of the service-pipes were done under agreements for the supply of gas between the said Longton Gas Company (Limited) and the private owners and occupiers of the several houses, shops, buildings, and places, and conduced to the convenient occupation of such houses, shops, buildings, and places, and were done at the request and with the approbation of the respective owners and occupiers thereof. The defendants used all reasonable despatch in digging the said trenches and

*663] laying down the said mains and service-pipes, both for the public and private lighting of the town, and in restoring the said footpaths and pavements, and the said streets and highways; and during the time that the said trenches were being dug and were open, and the said mains and pipes were being laid, the said footpaths and pavements, and the said streets and highways, were not otherwise interfered with than was necessary for digging the said trenches and laying the said mains and pipes. Before the trenches for public or private lights were dug, and the several mains and service-pipes were laid, the said Longton Gas Company (Limited) had obtained the consent of the Board of Surveyors of Highways of the town of Longton, and the approval and consent of the inhabitants of Longton in public meeting assembled and convened by the chief bailiff "to consider and determine on the best measures to be taken to promote the establishment of The Longton Gas Company," to the said trenches being dug, and mains and pipes being laid for both public and private lights. The lord of the manor of Longton, having been also applied to, had written a letter to the solicitor of the Company in these words: "Your Company is quite welcome, so far as I am concerned, to lay down your mains and pipes in the streets of Longton, provided they agree to pay me £5. 5s. a year. As soon as the Company is sufficiently constituted, you can send a draft of an agreement for their approval to my solicitors." And after the acts charged in the four first counts, but before the acts charged in the fifth count, the Company obtained the license under seal of the said lord of the manor, which includes the township of Longton. (A copy of this license was annexed to and was to be referred to as part of the case. The special facts relating to the

*charges in each count of the indictment, taken separately, were then stated in the case. It is unnecessary, however, to [*664 set these out.)

The Court was to draw inferences of fact, and to be at liberty to give leave to have the case turned into a special verdict.

The questions for the opinion of the Court were: First, Whether, under the circumstances before mentioned, the defendant Joseph Knight ought to be found Guilty. If the Court should be of opinion in the affirmative, then the verdict against him was to stand on the fourth count only; otherwise that verdict was to be set aside and a verdict of Not guilty entered.

Secondly, whether the verdict of Guilty was to stand against the other defendants, as regards the acts done for the purpose of the public lighting of the said streets, roads, lanes, and other public passages and places.

Thirdly, whether the verdict of Guilty was to stand against the said other defendants, as regards the acts done for the purpose of supplying gas to private individuals for the lighting of the said private houses, shops, buildings, and places.

If the Court should be of opinion in the affirmative on either of the above questions, then the verdict of Guilty was to stand on such one or more of the counts as the Court should direct; otherwise it was to be set aside and a verdict of Not guilty entered.

The case was argued in last Hilary Term.(a)

Bovill, for the Crown, cited *Ellis v. Sheffield Gas Consumers' Company*, 2 E. & B. 767 (E. C. L. R. vol. 75), and *Rex v. Medley*, 6 C. & P. 292 (E. C. L. R. vol. 25).

**Sir Fitzroy Kelly*, for the defendants, cited *Rex v. Jones*, 3 Campb. 230, *Regina v. Betts*, 16 Q. B. 1022 (E. C. L. R. vol. 71), and *Regina v. Russell*, 3 E. & B. 942 (E. C. L. R. vol. 77). [*665

Bovill was heard in reply.

The arguments on both sides sufficiently appear from the judgment of the Court. *Cur. adv. vult.*

COCKBURN, C. J., now delivered the judgment of the Court.

The indictment in this case charged the defendants with obstructing certain highways and footways in the town of Longton, in the county of Stafford, by placing earth and bricks there, and by digging trenches therein. At the trial, the Company and certain of the defendants were convicted, subject to the opinion of this Court upon a special case, from which the following facts appeared. In the town of Longton there was a gas Company, established by an Act of Parliament which incorporated the provisions of The General Gas Companies Act. There was also a body of Commissioners for the purpose of public lighting, with powers to lay down mains and pipes for the public lighting of the town, but with no powers to supply or lay down pipes for the supply of private houses or individuals. The Commissioners, who had formerly been supplied with gas by the old Company, entered into a resolution to transfer and did duly transfer their powers to the defendants, The Longton Gas Company (Limited), who were a joint stock *Company, but without any parliamentary powers as a gas Company. The indictment was preferred against the Com- [*666

(a) Saturday, 21st January. Before Cockburn, C. J., Crompton and Hill, J.

pany for obstructing the public highway by opening trenches and laying down pipes for conveying gas to the public lights and to private premises. On the argument before us it was conceded, on the part of the Crown, that the conviction could not be sustained against the defendants in respect of any of the acts done in making and laying down mains and pipes for the public lighting of the town, the acts in such respect being authorized by the powers transferred to them by the Commissioners. It was admitted, on the part of the defendants, that they had no parliamentary powers which gave them authority to create obstructions or lay down pipes for private supply. The question, therefore, was confined to the acts done by the defendants in laying down bricks and earth, and digging trenches, in one instance across the street, but in the other instances across the footway of the street, for the purpose of laying down supply or service pipes to private houses, from the mains laid down under the powers of the Commissioners for public lighting. It appeared that these service-pipes had been laid down by the joint stock Company at the request and by the direction of the owners of the houses; and that they had been so laid down carefully, without creating any unnecessary nuisance. It was not disputed, however, that the highway was obstructed, so as to amount to an indictable nuisance, unless the defendants were justified in committing the acts complained of in the exercise of the right of each householder to make such slight temporary obstruction on a highway or footway as may be necessarily incidental to the enjoyment of his property, such, for example, as *the obstruction
 *667] caused in using the common coal-holes in the pavements, the unloading of carts, the putting up boards for repairing, and other similar temporary obstructions. We are of opinion that the present case does not fall within any of the exceptions to the general law as to the obstruction of highways. We find no authority according to which so wide and large an exception to the general rule is established as would allow either a private person or a body acting at the request of private persons to open the streets for the purpose of supplying private houses with water or gas from sources from which a supply of water or gas may be procured. Such an act is not, in any respect, a user of the highway, such as occurs where a cart or carriage stops before a door, or where goods are unloaded in the highway, to be immediately taken into the house. Such matters may well be said to be a use of the highway as a highway: and this is made more clear by the rule that where there is an excess or abuse in such case the party is indictable. Thus, where, instead of using the highway merely for taking the goods in, the party sawed blocks of wood in the street before taking them in, he was held to be indictable for so doing.^(a) The case put, of the coal-holes in the pavement of a street, is perhaps the one apparently most in favour of the defendants. It is not, however, to be assumed that there is any right in the owner of a house to open the pavement to make a new coal-hole where none has existed before. He could not, we think, make a new hole in the middle of the street, if his cellar extended so far. In many instances,
 *668] no doubt, such coal-holes may be of right, as *where they have been made when the houses were first built, and so, as was

(a) *Rex v. Jones*, 3 Campb. 230.

suggested during the argument, the highway has been dedicated subject to such use. In many cases of a single obstruction for a short time, for the purpose of obtaining some such advantage, there would probably be no indictment, although the party might strictly be liable to indictment, and although, were such instances multiplied, it might become necessary to indict. It may also be that the almost universal use of coal-holes may have led to their not being complained of as they might be, or their being regarded as a usual, if not a necessary, means of enjoying the house, if made in their usual place. They do not, in any of these respects, appear to be analogous to the case now before us; for there is no evidence that the right here claimed originated in any reservation, nor is its exercise matter of absolute necessity; nor is it one ordinarily exercised by the owners of property, except under parliamentary powers, and subject to regulations imposed for the protection of the public. The case is not one of absolute necessity, either for the party or for the public, as in the case of a boarding required during the repairing of a house to protect the public, or in the case of putting a ladder against a house to clean windows, or to escape in the case of fire. General convenience is greatly against the allowing private persons, or Companies without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewerage, and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience, even when done under the restrictions which an Act of Parliament puts upon the persons clothed with *parliamentary authority so to act; and it would be difficult to see how far the annoyance might extend, if unauthorized dealings of this nature with the highways were allowed. Is every private person to be at liberty to open the street for laying down a pipe to any gas works, or to any conduit of water, or to any well or fountain in a market place? How far is such a right to extend? If everybody may lay down such a pipe from the nearest water or gas, how great would be the inconvenience from the continual opening of the streets for the first laying down and for the constantly recurring purpose of repairing. Were such private rights, as to gas, sewerage, and water pipes, to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes, that it is more easy to get at the supply of gas than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights which, in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, such a right as is here claimed, of interfering with the streets, is never exercised except under the authority of Acts of Parliament conferring special powers, with great care and under proper control, in the case of gas, by placing the Companies supplying it under the provisions of The General Gas Works Companies Act, according to which the parties are subjected to wholesome restrictions and to the control of the magistrates. We think, therefore, that the obstructions in question are indictable, and that the conviction was right; and the verdict must be

*670] entered accordingly. A *question was raised, but not very seriously pressed, as to whether one of the defendants, who had given directions to have the particular work done to his own house, was properly convicted. On this we entertained no doubt, as the party giving orders to commit a nuisance is a principal in the transaction. It was agreed at the trial that the defendants should be at liberty to turn the case into a special verdict if the Court should think fit to give them leave so to do; and, considering the importance of the question, we think it quite right that such leave should be given. If that course is taken, that which was conceded in the argument must be found as a fact in the special verdict, namely, that there was obstruction to the road; and the question must be as to whether the parties are indictable for making such obstruction, under the circumstances. Our judgment will be for the Crown, as to the obstructions arising from laying down the service-pipes.

Judgment for the Crown.

A householder adjoining a highway may make an excavation for an area if properly guarded, and not continued for an unreasonable length of time: *Clark v. Fry*, 8 Ohio N. S. 358: and he may throw his fuel on the street for the purpose of having it carried into his house: *Commonwealth v. Passmore*, 1 S. & R. 219; and place building materials there if there is a necessity for it; but such necessity will not be presumed from the fact that the building was being erected in a populous city; it must be shown: *Wood v. Mears*, 12 Ind. 515: and the owner of land across which a public highway runs may have a drain or watercourse over it, provided he constructs and keeps up bridges: 28 Penna. St. Rep. 355.

MEMORANDUM.

IN this Vacation, Sir William Henry Watson, Knight, one of the Barons of the Court of Exchequer, died. He was succeeded in the following Term by James Plaisted Wilde, Esq., one of Her Majesty's Counsel, who, upon being called to the degree of the coif, gave rings with the motto "Veritas victrix." He shortly afterwards received the honour of knighthood.

END OF HILARY VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Easter Term,

OF THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1860.

The Judges who usually sat in banc in this Term were:—

COCKBURN, C. J.

HILL, J.

CROMPTON, J.

BLACKBURN, J.

HEDEN v. The ATLANTIC ROYAL MAIL STEAM NAVIGATION COMPANY. *April 20.*

A plaintiff in, amongst other actions, *detinue*, who sues in a superior Court, when he might have sued in the London Sheriffs' Court, and recovers by verdict less than 20*l.*, is, by The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), sect. 121, to be entitled to his costs if the Judge before whom the verdict is obtained "shall forthwith certify on the back of the record that it appeared to him at the trial that" "there was a sufficient reason for bringing the" "action in the" superior Court.

At the trial, on 3d February, of such an action, plaintiff had a verdict for 10*l.*, and thereupon applied to the presiding Judge for a certificate for costs. The Judge took time to consider the application, defendants raising no objection to that course. On 15th February, the Judge granted the certificate.

Held, that defendants were precluded from objecting that the certificate was not granted forthwith, within the meaning of the statute.

DETINUE. At the trial, before Cockburn, C. J., at the sittings at Westminster after last Hilary Term, *the plaintiff had a ver- [*672 dict, with 10*l.* damages. The defendants carried on their business within the jurisdiction of the London Sheriffs' Court; and,

consequently, the plaintiff's counsel, as soon as the verdict was delivered, applied to the learned Judge to certify, under sect. 121 of the London (City) Small Debts Extension Act, 1852, 15 & 16 Vict. c. lxxvii., that there was a sufficient reason for bringing the action in the superior Court. His Lordship declined to grant a certificate at once, but said that he would take time to consider the application; to which the defendants' counsel made no objection. The trial took place on 3d February, and on 15th February the application to the learned Judge was renewed, on behalf of the plaintiff; when his Lordship, on being informed that certain similar actions which had been brought against the defendants would not be proceeded with, gave the certificate as asked for.

Tompson Chitty now moved, on behalf of the defendants, for a rule calling on the plaintiff to show cause why the certificate should not be rescinded.—Sect. 121 of the London (City) Small Debts Extension Act, 1852, enacts that if the plaintiff in, amongst other actions, detain, recovers less than 20% by verdict, in a superior Court, “and the Judge” “before whom such verdict shall be obtained shall forthwith certify on the back of the record that it appeared to him at the trial that” “there was a sufficient reason for bringing the said action in the Court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this Act had not been passed.” By reason of this enactment, it is *673] essential that the Judge's certificate be given at the trial; otherwise, the Judge cannot be said to certify “forthwith.” [COCKBURN, C. J.—I thought, at the trial, that the action was properly brought in the superior Court, but reserved my decision because I considered that the costs of the other actions ought not to be thrown upon the defendants. As soon as I was informed that those actions were to be discontinued, I gave my certificate. CROMPTON, J.—The counsel for the defendants made no objection at the trial to the Judge taking time to consider.] The defendants' counsel gave no express assent to the delay. *Chaplin v. Levy*, 9 Exch. 673,† is directly in point to show that where the plaintiff, in a case of this description, recovers less than 20%, the Judge's certificate for costs must be granted at the trial, and that it is only in cases where the amount recovered is between 20% and 50% that the certificate may, by reason of sect. 119 of the Act, be granted within a convenient time after the trial. *Castrique v. Page*, 13 Com. B. 458 (E. C. L. R. vol. 76), shows that, where less than 20% is recovered, the plaintiff loses his costs absolutely, unless the Judge certifies under sect. 121. [CROMPTON, J.—By not objecting to the course pursued by the Judge, the defendants must be taken to have assented to it.]

PER CURIAM.(a)—There can be no rule.

Rule refused.

(a) Cockburn, C. J., Crompton and Blackburn, J.

***HORLEY, Appellant, v. ROGERS, Respondent.**
April 21.

[*674]

By stat. 5 G. 4, c. 83, s. 3, it is made a punishable offence in any person, who has the means of maintaining his family, to wilfully refuse or neglect so to do, whereby any of his family, whom he is legally bound to maintain, become chargeable to any parish. By sect. 6 any one may apprehend and take before a magistrate, or may deliver to any constable, to be taken before a magistrate, "any person who shall be found offending" against the Act; and any constable refusing or neglecting wilfully to apprehend such an offender is made liable to conviction. By sect. 7 magistrates are empowered to grant warrants for the apprehension of offenders against the Act.

Held, that a constable is not liable to conviction under sect. 6 for refusing to apprehend, without a warrant, at the request of the relieving officer of a parish, a man charged by the officer with having wilfully neglected to support his wife, and caused her to become chargeable to the parish; the person so charged not being, even if guilty, "found offending" within the meaning of that section.

CASE stated, under stat. 20 & 21 Vict. c. 48, by one of the Metropolitan Police Magistrates, as follows.

This matter came on before me, on 8th December, 1859, upon a summons taken out by the appellant, Horley, charging the respondent, who is one of the Metropolitan Police constables, with "unlawfully refusing to take into his custody from Horley one James Whistler, who was found by him offending against stat. 5 G. 4, c. 83, intituled 'An Act for the punishment of idle and disorderly persons, and rogues and vagabonds,' and was apprehended, for so offending, by Horley."

The only witness examined was Horley, who stated as follows. "I am relieving officer of Christ Church District, in St. Saviour's Union. There was a person of the name of Charlotte Whistler in the work-house receiving relief. On 17th November last, I went, from information I received, to a house, No. 121, Waterloo Road. I found the husband of the woman who was chargeable; he was removing goods. I believe he was residing at that house. I charged him with neglecting to support his wife; and I said I was the relieving officer of Christ Church. He said she was quite able to support herself, *as she could earn 10s. per week, and she had not been faithful. [*675 I said that was a question that must be settled by the magistrate. I sent for a constable, and defendant came, and I told the constable that I was relieving officer of St. Saviour's Union; that Whistler's wife was chargeable; and that I wished him to convey Whistler to the Police Court. He at first said he would. Whistler said he did not see why he should support her; she went with other men. The constable said to me, 'I suppose you have a warrant.' I said I had not, and he said his orders were, not to take such a charge, and he refused to take the man. I said, 'You observe the man is removing away;' and I asked the man for his address, and the man refused to give it to me. I have not seen the man since.

Cross-examined. "I had not taken any pains to ascertain, before I sent for a constable, whether the man was able to support his wife. I did not know the constable. When the constable refused to take the man, I said, 'I shall take your number, as I wish to have the point settled.' Whistler did not say he would go to the station."

Re-examined. "The man admitted he earned 15s. per week; in the presence of the constable."

The decision of the case depends upon the construction of the 8d, 4th, 5th, 6th, and 7th sections of stat. 5 G. 4, c. 88, commonly called The Vagrant Act. Under the circumstances, as proved before me, I was of opinion that the respondent was not bound to take Whistler into custody, inasmuch as he, Whistler, was not found offending against the above-mentioned Act of Parliament; and I therefore dismissed the summons. The appellant, being dissatisfied with my determination, applied to me to state this case.

*676] ** Collier*, for the appellant.—The respondent was bound to take Whistler into custody. By stat. 5 G. 4, c. 88, s. 3, "Every person being able wholly or in part to maintain" "his" "family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect" "any of his" "family whom he" "may be legally bound to maintain, shall have become chargeable to any parish" "shall be deemed an idle and disorderly person within the true intent and meaning of this act;" and may be committed to the House of Correction. By sect. 4, persons committing certain offences therein mentioned are to be deemed rogues and vagabonds; and, by sect. 5, certain persons are to be deemed incorrigible rogues. Sec. 6 enacts that "It shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act, and forthwith to take him before" a magistrate, to be dealt with according to the Act, "or to deliver him" "to any constable or other peace officer of the place where he" "shall have been apprehended, to be so taken" before a magistrate; "and in case any constable or other peace officer shall refuse or neglect wilfully to take such offender into his custody, and to take" him before a magistrate, "it shall be deemed a neglect of duty in such constable or other peace officer, and he shall on conviction be punished" as the Act directs. And, by sect. 7, magistrates are empowered to grant warrants to apprehend persons who have committed or are suspected of having committed any offence against the Act. The question turns upon the construction of sect. 6. Whistler was "found offending" within the meaning of that section, when the appellant directed the respondent to take him into custody, telling the respondent, *677] at the same time, *what the offence charged against Whistler was. The respondent was bound to act upon the information given him, that Whistler's wife was chargeable. [COCKBURN, C. J.—The offence charged against the man was not one obvious to the eye and senses of the constable at the time the charge was made, and it cannot be said that the man was then found committing it. How was the constable to know whether the wife was or was not living, as her husband alleged, with another man; or to decide that all the circumstances existed necessary to constitute the offence? Application for a warrant ought to have been made to a magistrate in the first instance, under sect. 7.]

T. F. Ellis, contra, was not called upon.

PER CURIAM.(a)—The facts sufficient to create the alleged offence were out of the knowledge of the constable. The summary power to apprehend without a warrant, given by the statute, applies only to cases where the offence is apparent and is in course of perpetration by the offender, before the eyes of the constable; not to cases where it

(a) Cockburn, C. J., Crompton, Hill, and Blackburn, J.

depends upon circumstances unknown to the constable whether the offence has been committed or not.

Judgment for the respondent.

*The LUTON LOCAL BOARD OF HEALTH, Appellants, [*678
v. DAVIS, Respondent. *April 21.*

At the hearing, by justices, of a summons taken out by appellants against respondent, for non-payment of a special district-rate to which he had been assessed by appellants, a Local Board of Health, under The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 86, it appeared that the rate was good on the face of it, and had not been appealed against; and that respondent had failed, after due demand, to pay it. Respondent, however, contended that the rate was bad, on the ground that it was made in order to pay off money borrowed by appellants for the execution of works not of a permanent nature; whereas, under sect. 86 of the Act, special district-rates may be made, and, under sect. 107, money may be borrowed, in respect of such works only. It further appeared that the General Board of Health had consented to the borrowing of the money by appellants on the credit of the special district-rates, for the execution of the works in question; and had declared themselves satisfied that the works were of a permanent nature.

The justices declined to issue a distress-warrant to enforce the rate; and stated a case, under stat. 20 & 21 Vict. c. 43, for the opinion of this Court whether, under the circumstances, they ought to have done so.

Held, that the justices were bound to have issued the warrant, the rate being good on its face and unappealed against, and respondent's objection, if well founded, being ground for an appeal against it, under sect. 135 of the Public Health Act, to The Quarter Sessions, which alone had jurisdiction to decide on the validity of the rate.

CASE stated by justices of Bedfordshire, under stat. 20 & 21 Vict. c. 43.

At the Petty Sessions held at Luton, in Bedfordshire, on 28th March, 1859, a summons came on for hearing by which Frederick Davis, the respondent, was required to show cause why he had not paid and why he refused to pay the sum of 1*l.* 2*s.* 10*d.*, assessed on him for a special district-rate due to The Luton Local Board of Health, the appellants. It was proved or admitted that The Public Health Act, 1848, 11 & 12 Vict. c. 63, except sect. 50 thereof, was in force throughout the entire area comprised within the boundaries of the township of Luton, which had been duly constituted a district for the purposes of that Act. That the appellants, The Local Board of Health for the said district, for the purpose of improving the sanitary condition thereof, especially *by means of certain works of paving, [*679 flagging, channelling, and curbing certain streets and places therein, applied to The General Board of Health for its consent to their contracting a loan, and mortgaging the special district-rates under their care, in order to carry out such improvements, amounting to the sum of 5902*l.* 15*s.* That thereupon the said General Board consented to the borrowing and taking up at interest the said sum, on the credit of the said special district-rates; and that the appellants, in pursuance of the said Public Health Act, 1848, borrowed of the Public Works Loan Commissioners the sum of 5900*l.*, for the purpose aforesaid, upon mortgage of all and every the special district-rates which had been or should be made within the said district, according to the said Act, and all and every other rate and rates which the ap-

pellants had power to charge for the purposes of that security, with five per cent. interest on such sum or such part thereof as should remain due until the whole should be paid.

Copies of the aforesaid application, of the estimate referred to in it, of the consent of the General Board of Health, and of the surveyor's report as to the most advantageous mode of contracting for the works, were annexed to the case, and were to form part of it. Of these documents the following extracts are alone material.

The application, dated 22d May, 1856, stated that The Local Board had, for some time, been considering the propriety of paving the paths of certain old and new streets in the town of Luton, which were then in a very dirty and defective state; and that their surveyor had made a survey and estimate of the expenses of such paving, which was forwarded, with the application, for the *consideration of the General Board, who were thereby requested to give their assent to the Local Board obtaining a loan for the intended works.

The consent of the General Board, dated 18th July, 1856, recited (inter alia) that the Local Board had applied to the General Board for its consent to the borrowing and taking up at interest, upon the credit of the special district-rates to be made within the district, of the sum of 5902*l.* 15*s.*, for the purpose of executing certain permanent works of paving within the said district, the repayment of which, with interest, the Local Board proposed to secure by a mortgage or mortgages of the said rates; and that the General Board, after due inquiry and examination, was satisfied that the works, in respect of which the said sum was intended to be borrowed, were of a permanent nature, and for the benefit of the said district. It then proceeded to give consent to the borrowing and taking up at interest, by the Local Board, of the said sum, on the credit of the said special district-rates, according to the provisions of The Public Health Act, 1848.

The streets mentioned in the application, estimate, and consent, are public and common highways, and were so before and at the time when the Local Board was constituted. The appellants contracted with certain persons for the execution of the works aforesaid, and the whole of the sum of 5900*l.*, borrowed as aforesaid, was spent on the works; and the sum of 4591*l.* 12*s.* 11*d.*, parcel thereof, was expended in and for the benefit of a part of the said district within which the premises of the respondent, being a messuage and shop occupied by him, are situate. On 18th January, 1859, in pursuance of proper and *sufficient notices, the appellants made and *levied upon and in respect of all the premises situate within the said part of the said district (the said part comprising about two-fifths of the rateable value of the whole of the district), for the purpose of raising the due proportion, chargeable on that part of the district, of a certain instalment of the said principal sum so borrowed as aforesaid, and interest thereon (both of which became due on 20th January, 1859), a special district-rate; and the same was duly signed, sealed, and published. This special district-rate was laid upon a portion of the whole district, being the portion in which the works were done. In this rate or assessment the respondent was assessed, in respect of the said messuage or shop, at the sum of 1*l.* 2*s.* 10*d.*, on a rateable value of 27*l.* 10*s.*

At the hearing of the summons, the respondent appeared personally, and thereupon the special district-rate or assessment was produced on the part of the appellants.^(a) The making and publication of it were duly proved; and also a demand in writing made by the appellants' collector on the respondent, more than fourteen days before the issuing of the summons; and that the respondent had not paid. The justices were thereupon requested, on the part of the appellants, to issue their warrant of distress against the respondent for 1*l.* 2*s.* 10*d.* and costs; but it was objected by the respondent that the rate was bad. The justices, finding the construction of The Public Health Act, 1848, very obscure upon the said question so raised before them, did not consider themselves justified in issuing, and therefore declined to issue, a distress-warrant as prayed.

*The question for the decision of the Court was, Whether, [*682 under the circumstances, the distress-warrant ought to issue.

T. Jones (Northern Circuit), for the respondent.—The rate was bad. By sect. 86 of The Public Health Act, 1848, 11 & 12 Vict. c. 63, a Local Board is empowered to make and levy a special district-rate only "whenever any expenses are incurred or to be incurred by" them "in making, enlarging, altering, arching over, covering, or enclosing any sewer" "or in and about any other works, matters, and things of a permanent nature, and executed or done for the benefit of any district or part of a district." By "works, matters, and things of a permanent nature," works, &c., ejusdem generis with the construction or alteration of sewers must be meant. The work of paving streets is not a work of that permanent nature. It is, by sect. 68, made part of the ordinary duties of the Local Board from time to time to pave streets. By sect. 107 the Local Board may "borrow and take up at interest, on the credit of the rates authorized to be made or collected under this Act, any sums of money necessary for defraying any" "costs, charges, and expenses" incurred by the Board in the execution of the Act; "Provided always, that the money borrowed under the authority of this Act shall be borrowed only for works of a permanent nature." The Act, therefore, gave the Board no authority to borrow money for paving purposes; still less to make a special district-rate for the purpose of repaying it. [BLACKBURN, J.—The consent of the General Board to the borrowing of the money recites that permanent works of paving were to be executed. Can we say, as matter of law, that works *of paving are not permanent? COCKBURN, C. J.— [*683 That is a question not of law but of fact.] It was incumbent on the appellants to satisfy the justices that the works were in fact permanent. If they were not so, the rate was invalid, and the justices had no jurisdiction to enforce it. [HILL, J.—The case does not find that the rate was not good on the face of it, and we must therefore assume that it was. If so, was not your proper course to appeal to the Sessions against it, under sect. 135?] The justices were not justified in assuming that the works were of a permanent nature, merely because the appellants so described them. If the description of the works as permanent is conclusive, it follows that the appellants might call watering the streets a permanent work, and make a special district-rate in respect of that. [COCKBURN, C. J.—*Regina v. Justices of*

(a) No copy of the rate was set out in, or annexed to, the case.

Kingston-upon-Thames, E. B. & E. 256 (E. C. L. R. vol. 96), is clearly against you, and shows that the Justices ought to have enforced the rate on being satisfied that it was unappealed against.]

Taylor, contra, was not called upon.

COCKBURN, C. J.—I am of opinion that the justices had no course open to them but to issue a warrant for the payment of the rate by the respondent. Mr. *Jones's* argument may or may not be well founded, as to the question of the authority of the Local Board, upon a true construction of the statute, to raise a special district-rate for the purpose of paying off a debt incurred in respect of this particular item of improvement. It may be that the item ought to have been *684] charged on the *general rates alone; but it is unnecessary to give any opinion upon that point, because it is quite clear that, even supposing that paving is not a permanent work for defraying which a special district-rate may properly be made, the rate, being good in point of form and being unappealed against, ought to have been deemed by the justices good in point of law. The consent of the General Board of Health recites that the works are of a permanent nature, and the rate, so far as we can infer from the case, appears to have professed, on the face of it, to be made for the purpose of raising money borrowed for the execution of such works. There was nothing before the justices to show that the rate was not good both in form and in substance. But it is said that there was this inherent vice in the rate, that the works were not, in fact, of the nature described. That would have been a good ground for an appeal against the rate to the Quarter Sessions, under sect. 135 of the statute. Sect. 136, which gives power to the Sessions, upon an appeal, to amend or quash the rate, contains a proviso that, notwithstanding the rate be quashed, "all moneys charged by such rate shall," if the sessions so order, "be levied as if no appeal had been made, and such moneys, when paid, shall be taken as payment on account of the next effective rate for the purposes in respect of which the quashed rate was made." If any person objecting to the validity of a rate to which he is rated might omit to follow the remedy by appeal, pointed out by the Act, and might take his objection to the rate before the justices, the proviso in sect. 136 would be rendered practically nugatory; for the justices have no jurisdiction to make the order therein referred to. To *685] hold that the justices *were entitled to exercise a discretion whether or not to issue their warrant, would be to run counter to the decisions in *Regina v. Justices of Kingston-upon-Thames*, E. B. & E. 256 (E. C. L. R. vol. 96), and other cases. I think that, under the circumstances, they were bound to issue the warrant.

CROMPTON, J.—As soon as it appears that the objection to the rate was a ground for an appeal, there is an end of the case. The principle of *Regina v. Justices of Kingston-upon-Thames*, and other decisions with respect to poor-rates, is applicable; especially as The Public Health Act, 1848, gives the Sessions similar powers, on the hearing of appeals, to those which they possess under the poor law. It is said that the justices had no jurisdiction to enforce the rate; but that is the very thing which they were bound to do, on being satisfied that the rate was good on its face and unappealed against. It is true that, as was held in *Milward v. Caffin*, 2 W. Bl. 1330, if a poor-rate

is made upon a person who occupies no land in the parish, the rate is absolutely void; that, however, arises from the very nature of the case, and is an exception to the general rule that a rate, good on the face of it, is binding till quashed on appeal. So, again, when a statute says that a rate shall be void unless certain previous ceremonies have been performed, proof that those ceremonies were performed is sufficient to show that the rate, if good on the face of it, and not appealed against, is binding. The justices at Petty Sessions cannot constitute themselves a Court of appeal against the rate; for the Legislature has not confided to them the power of deciding on its validity.

HILL, J.—I am of the same opinion. As the rate was *good [*686 on the face of it; as it was unappealed against; and as every- thing to give the justices jurisdiction was proved; the justices were bound to issue their warrant.

BLACKBURN, J.—I am of the same opinion. The case does not set out the rate, upon the form of which the whole question turns. I think, however, that enough appears to show us that the rate was good on the face of it. It may be that, on an appeal, the rate would be quashed; but it is of great importance that the principle should be acted upon that a rate, good on its face, is to be enforced, until appealed against. Persons aggrieved by such a rate as the present must follow the remedy of appeal pointed out by the statute. They cannot lie by, till the period for appealing has elapsed, and then oppose the rate before the justices, when it is sought to be enforced against them.

Judgment for the appellants.(a)

(a) It should seem that the provisions of stat. 20 & 21 Vict. c. 43 are inapplicable to circumstances such as those in this case. See *Regina v. Justices of Gloucestershire*, *antè*, p. 420.

*The QUEEN v. The Inhabitants of LIVERPOOL. [*687 *April 21.*

By stat. 16 & 17 Vict. c. 97, s. 97, an order of justices, adjudicating the settlement of a pauper lunatic, is to direct payment of the expenses of his maintenance, &c., to be made by the guardians of the parish of settlement, if it be a parish under a board of guardians; if not, by the overseers. Sect. 108 gives an appeal to the Quarter Sessions against such an order; and sect. 113 empowers the Sessions, at the hearing of the appeal, to amend any omission or mistake in the drawing up of the order, if satisfied that enough was in proof before the justices making it to have authorized them to have drawn it up correctly.

L. was a parish in which, under a Local Act, the rector, churchwardens, and overseers, together with twenty-one other persons elected in pursuance of the Act, were constituted the select vestry of, and the board of guardians for, L.

An order of justices made under stat. 16 & 17 Vict. c. 97, s. 97, adjudging the settlement of a pauper lunatic to be in L., directed payment of the expenses of his maintenance, &c., to be made by the churchwardens and overseers of L.; and was served on the overseers. On an appeal by the overseers to the Quarter Sessions against this order, the Sessions amended the order by substituting in it the word "guardians" for the words "churchwardens and overseers."

Held, that the order of justices was bad, being directed to and served upon a body distinct from the guardians of L., and not upon the guardians of L. under a misnomer.

Held further, that the Sessions had not power, under sect. 113, to amend the order as stated; the amendment making the order a new one, and upon new parties who were not before the Sessions.

ON an appeal to the Midsummer Quarter Sessions, 1859, for the North Riding of Yorkshire, in which the overseers of the poor of the

parish of Liverpool were appellants, and the overseers of the poor of the township of Clifton, in the said North Riding, respondents, against an order of two justices of the said Riding, which had been duly served upon the said overseers of Liverpool, adjudging the place of the last legal settlement of William Lancaster, a pauper lunatic, then confined in the public asylum for the North and East Ridings of Yorkshire at Clifton, in the said North Riding, to be in the parish of Liverpool, and ordering the overseers of the poor of the said parish of Liverpool to pay certain sums of money for the maintenance and care of the said lunatic and certain costs; the Sessions confirmed the order, *688] *subject to a case for the opinion of this Court, the substance of which was as follows.

Ever since the passing of stat. 5 & 6 Vict. c. lxxxviii.(a) entitled "An Act for the administration of the laws relating to the poor in the parish of Liverpool in the county of Lancaster," the laws relating to the poor of the said parish have been administered under the said Act, and all the provisions and regulations of the said Act have been and still are observed in the said parish. At the trial of the appeal it was objected by the appellants, under grounds of appeal which raised the objection, that the order was bad, because the overseers of the poor of the parish of Liverpool were thereby ordered to pay the sums mentioned in the order; whereas the order should have been made upon the select vestry of the said parish, constituted under the said Act.

The order (which was to be considered as part of the case) was addressed "To the guardians of the poor of the York Union, and the overseers of the poor of the township of Clifton in the North Riding of Yorkshire, and to the churchwardens and overseers of the poor of the parish, township, or place of Liverpool, in the county of Lancaster." It then, after making the necessary recitals and adjudging the settlement of the pauper lunatic to be in the parish of Liverpool, proceeded to order "You, the overseers of the poor of the said parish of Liverpool, to pay" the several sums specified in the order.

The Sessions overruled the objection, subject to the opinion of this *689] Court. The respondents then applied *to the Sessions to amend the order, under stat. 16 & 17 Vict. c. 97, s. 113, in case it should be necessary, by inserting in it, instead of the words "the churchwardens and overseers of the poor of the parish of Liverpool," the words "the guardians of the poor of the parish of Liverpool." The appellants objected that the Sessions had no power to make such an amendment; and also that, if the order was otherwise invalid, it was not rendered valid by reason of such amendment. The Sessions made the amendment as requested, subject to the opinion of this Court as to whether they had power to make any such amendment; and also as to whether the order (if otherwise invalid) was rendered valid by the amendment. The respondents also contended that the above amendment by the Sessions was final, by virtue of stat. 16 & 17 Vict. c. 97, s. 116.

If the Court should be of opinion that, upon the objection so taken as above mentioned, the order as originally made by the justices, and without any amendment, was good, the order of justices and the order

(a) Local and personal, public.

of Sessions were to be confirmed. If the Court should think that the order as originally made, and without any amendment, was bad upon the above objection, the questions for the Court were to be: First, Whether the Sessions had the power to make the amendment under stat. 16 & 17 Vict. c. 97; and, Secondly, Whether the order was rendered valid by reason of such amendment, or (*sic*) the said amendment by the Sessions was final.

If the Court should be of opinion either that the Sessions had no power to make the amendment, or that the amendment, when made, did not render the order valid, and that the said amendment by the Sessions was not final, the order of justices and the order of Sessions *were to be quashed; otherwise they were to be confirmed. [*690

Price and *A. W. Simpson*, for the respondents.—First, the order, as originally made, was good. By stat. 16 & 17 Vict. c. 97, s. 97, the justices who inquire into and adjudge the settlement of a pauper lunatic are to “order the guardians of the Union to which the parish in which such lunatic is adjudged to be settled belongs, or of such parish in case such parish be in a Union or be under a Board of Guardians, and if not, then the overseers of such parish, to pay” the expenses incurred with reference to the lunatic. And sect. 108 gives an appeal to the Quarter Sessions, against an order of adjudication of the settlement of a lunatic, to “the guardians of any Union or parish, or the overseers of any parish.” It is said, for the appellants, that the order, to comply with the requirements of sect. 97, should have been made on the select vestry of Liverpool, which is constituted the Board of Guardians for Liverpool by the local Act, 5 & 6 Vict. c. lxxxviii.; sect. 1 of which enacts, “That the rectors, the churchwardens, and the overseers of the poor of the” “parish” of Liverpool “for the time being, together with twenty-one persons to be elected in the manner by this Act directed, shall be the select vestry for carrying into execution the provisions of this Act, and shall be styled ‘The select vestry of the parish of Liverpool,’ and shall be and shall be deemed to be a Board of Guardians for the relief and management of the poor,” with all the rights, powers, privileges, and duties of guardians of the poor. Assuming, however, that view to be correct, the order, being made on “the churchwardens and overseers of the poor of the parish of Liverpool,” may be considered as having been *made on them as representatives of the whole vestry, of which they are the most important members. [CROMPTON, [*691 J.—I think it is clear that the order, as originally made, was not made on the guardians of Liverpool in a manner such as to satisfy stat. 16 & 17 Vict. c. 97, s. 97.] Then, secondly, the Sessions had power to amend the order at the hearing of the appeal, under sect. 113 of that statute, which enacts that “if,” at the hearing, “any objection be made on account of any omission or mistake in the drawing up of such order, and it be shown to the satisfaction of the” Sessions “that sufficient grounds were in proof before the justices making” the “order to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for” the Sessions “to amend such order and to give judgment as if no such omission or mistake had existed.” The mistake, if any, in the parties to whom the order was directed, was amendable under this section. In *Rex v. Amlwch*, 4 B. & C. 757

(E. C. L. R. vol. 10), an order of removal was directed to the churchwardens and overseers of the parish of L., which place was in fact a vill, and had no churchwardens. This Court held that the word "churchwardens" might be rejected as surplusage, and that the Sessions had power, under a statute^(a) which authorized them to amend any defects in form in orders appealed against, to amend the order by inserting in it the words "or vill." [BLACKBURN, J.—In that case the churchwardens were non-existent persons: but here the order is made upon actual churchwardens.] In *Rex v. Bingley*, 4 B. & Ad. 567 note (a) (E. C. L. R. vol. 24), it was held that the Sessions had power to amend an order of removal to the township of Bingley, by altering the word "township" to "parish," the township being one
 *692] of several which together made up the *parish, and did not separately maintain their own poor, who were maintained by the parish collectively. *Rex v. The Justices of Carmarthenshire*, 4 B. & Ad. 563 (E. C. L. R. vol. 24), shows that a mistake which cannot mislead becomes, when the order in which it occurs has been acted upon, immaterial. *Regina v. Hellingly*, 1 E. & E. 749 (E. C. L. R. vol. 102), is an illustration of the rule that, upon a question of the amendment of an order of justices, every reasonable presumption should be made in favour of there having been sufficient grounds in proof before the justices to have authorized them to draw up the order free from mistake. In *Regina v. Heaton*, 1 E. & E. 782 (E. C. L. R. vol. 102), this Court put a liberal construction on the provisions of stat. 16 & 17 Vict. c. 97, sects. 97, 107; holding that the overseers of a township in a Union, on whose behalf an order of adjudication and maintenance of a pauper lunatic had been obtained by the guardians of the Union, were to be considered as the parties obtaining the order, within the meaning of sect. 107. [HILL, J.—In the cases which you have cited, the proper parties were before the Court, though under a misnomer. But, in the present case, the order was in fact made on the wrong parties.] The order was made on the most important amongst the persons on all of whom it ought to have been made. Lastly; even if the Sessions had no power to amend, the amendment, once made, is final, by reason of stat. 16 & 17 Vict. c. 97, s. 116, which provides that the decision of the Sessions, at the hearing of any appeal against any order of adjudication of the settlement of a lunatic, upon (inter alia) "the amending or refusing to amend the order" "shall be final, and shall not be liable to be reviewed in any Court." [BLACK-
 *693] BURN, J.—*The point seems to be whether the Sessions did not in effect, instead of merely amending a mistake in the order appealed against, make a new order altogether, and upon different persons. The appellants were not before them.]

Pickering, contra, was stopped.

(COCKBURN, C. J., was absent.)

CROMPTON, J.—I am of opinion that the Sessions had no power to make the amendment. Stat. 16 & 17 Vict. c. 97, s. 97, requires an order of justices for the adjudication of the settlement of a pauper lunatic to be made on the guardians of the parish of settlement, if that parish is under a board of guardians. Liverpool, the parish of settlement in the present case, is under a board of guardians; that

(a) 5 G. 2, c. 119, s. 1.

board consisting, by reason of the Local Act, 5 & 6 Vict. c. lxxxviii., s. 1, of the select vestry of the parish. The churchwardens and overseers of the parish are a distinct and separate body from the select vestry; and the order of justices, being made upon the churchwardens and overseers, instead of the select vestry, was made upon the wrong body. Then the question is, whether this was a mere mistake of the justices, amendable by the Sessions under sect. 113 of stat. 16 & 17 Vict. c. 97. I am of opinion that it was not; and that the Sessions were virtually asked, not to amend an existing order, but to make an entirely new order on new parties. If such an amendment might be made, I do not see where the power of amendment is to stop. In the cases cited for the respondents the proper parties were before the Court, *though under a misnomer; but, here, the guardians [*694 were not before the Sessions at all. The orders of justices and of Sessions must therefore be quashed.

(HILL, J., was absent.)

BLACKBURN, J.—I am of the same opinion. Had the order of justices been intended to be made on the guardians, that is to say, the select vestry of Liverpool, and had it merely misdescribed that body, I think that the cases which have been cited show that the order would have been amendable; but, on the contrary, it was clearly intended to be made on a different body from the guardians; and was therefore bad, because Liverpool is a parish under guardians, and stat. 16 & 17 Vict. c. 97, s. 97, requires the order to be made on the guardians, in the case of such a parish. Then, sect. 113 empowers the Sessions, on an appeal to them against the order, to amend any mistake in the drawing up of the order, on being satisfied that sufficient grounds were in proof before the justices making the order to have authorized the drawing up of the order free from the mistake. That section would, I think, have applied here, had the order been intended for, and served upon, the select vestry, who are the guardians for Liverpool, and had it been addressed to them under a wrong name. If so, they would have been the parties before the Sessions; as it is, a different body, the overseers, were served with the order and were the parties to it. By the so-called amendment the Sessions in effect made a new order upon new parties, whom they substituted for those who were before them: and this the Act gave them no power to do.

Orders quashed.

*COLE, Appellant, v. COULTON, Clerk to the KING'S LYNN PAVING COMMISSIONERS, Respondent. April 21. [*695

The King's Lynn Improvement Act, 22 Vict. c. xxxii., s. 113, incorporates the clauses of The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, relating to places of public resort. By sect. 85 of the latter Act, "every person keeping any house" "or other place of public resort" "for the sale or consumption of refreshments of any kind, who knowingly suffers common prostitutes" "to assemble at and continue on his premises" is made liable to a penalty. By stat. 22 Vict. c. xxxii., s. 120, justices who inflict any penalty under the Act are to award it to be paid either to the Corporation, or to the Paving Commissioners, of King's Lynn, according as the proceeding for the penalty is taken on behalf of the one or other of those bodies.

Appellant, a licensed alehouse keeper at King's Lynn, was convicted by justices, on an

information laid by respondent, the clerk to the Paving Commissioners, in a penalty under stat. 10 & 11 Vict. c. 89, s. 35. Respondent had no authority from the Commissioners, express or implied, to lay the information, further than that he had, by their direction, published a handbill, signed by him as their clerk, stating that the section in question would be strictly enforced.

Held, that the conviction was good; for that, first, the information was well laid; per Cockburn, C. J., because, the offence charged being one against the public, respondent, assuming that he had no sufficient authority from the Commissioners to inform, might inform in his individual capacity, provided (as it was to be taken that he had done) he claimed the penalty on behalf of the Commissioners; per Crompton, J., because the facts showed that respondent had professed to inform on behalf of the Commissioners, and, if so, he could not be required to show that he had in fact (as *seem* he had) their authority to inform. That, secondly, licensed alehouses are not excepted from the operation of stat. 10 & 11 Vict. c. 89, s. 35, although the keepers of them are subject to the provisions of prior Acts of Parliament. Judgment on both points concurred in by Blackburn, J.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43, in substance as follows.

At the Petty Sessions held in and for the borough of King's Lynn, in the county of Norfolk, on 5th December, 1859, an information was preferred by Coulton, the respondent, against Cole, the appellant, under sect. 113 of The King's Lynn Waterworks and Borough Improvement Act, 1859, 22 Vict. c. xxxii., (a) which is as follows: "The *696] clauses of The Town Police Clauses Act, *1847, with respect to" "places of public resort, are incorporated with this Act," "and the expression 'the Commissioners' in those clauses" "means, for the purposes of this Act, the Paving Commissioners." One of the clauses, with respect to places of public resort, of The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, is as follows: Sect. 35, "Every person keeping any house, shop, room, or other place of public resort within the limits of the special Act for the sale or consumption of refreshments of any kind who knowingly suffers common prostitutes or reputed thieves to assemble at and continue in his premises shall, for every such offence, be liable to a penalty not exceeding 5*l*." The information stated that, on 22d November, 1859, at the parish of St. Margaret, in the said borough, Cole, the appellant, of Purfleet Street, in the said borough, then and there being an alehouse keeper and duly licensed to sell exciseable liquors by retail in his house and premises there situate, and known by the sign of The Sailors' Home, and then and there keeping the said house for the sale and consumption of refreshments, to wit, beer and other exciseable liquors, did knowingly suffer four common prostitutes to assemble at and continue in his said house and premises, contrary to The King's Lynn Waterworks and Borough Improvement Act, 1859.

At the hearing of the information, it was objected by the appellant, and admitted by the respondent, that the respondent had no express authority from any meeting of the Paving Commissioners to lay that particular information: but the respondent referred to the following handbill, published by him, by direction of a meeting of the Commissioners, which he considered a sufficient authority.

*697]

*" King's Lynn.

"Places of Public Resort.

"Notice is hereby given that, by The Town Police Clauses Act, 1847, as incorporated by The King's Lynn Waterworks and Borough

(a) Local and personal, public.

Improvement Act, 1859, it is enacted as follows." [Sect. 35 of The Town Police Clauses Act, 1847, was here set forth at length.] "And notice is hereby further given that, from and after 11th May, 1859, such penalty will be strictly enforced."

"By order,

JNO. JAS. COULTON,

"Clerk to the Lynn Paving Commissioners."

"King's Lynn,

"4th May, 1859."

The justices overruled the appellant's objection, and allowed the respondent to proceed and give evidence upon the information as laid.

It was proved that the appellant was a licensed alehouse keeper, and kept an alehouse within the said borough, and within the limits of the special Act. (The case then set out the particulars of the offence charged in the information: which, however, need not here be given.) It was objected, on behalf of the appellant, that sect. 35 of The Town Police Clauses Act, 1847, did not apply to licensed alehouses. He also proved that the prostitutes had come and gone several times, during the evening of the day laid in the information, to and from the appellant's house, and had not continued there more than half an hour on each occasion; and that, on one of those occasions, each of them took a glass of raspberry wine, for which they themselves paid: and it was contended that this was not such an assembling at, and continuing in, the premises as was within the meaning of the said sect. 35 of the said Act; it being for the *purpose [*698 of refreshment only and not for any illegal or immoral purpose.

The justices, however, being of opinion that an alehouse or public-house was a house and place of public resort within the meaning of the section, and finding, upon the evidence, that the appellant knowingly suffered four common prostitutes to assemble at and continue in his premises, and that there was a meeting together and remaining beyond a fair and reasonable time for the purpose of refreshment, convicted the appellant of the offence charged in the information, and adjudged him for his said offence to forfeit and pay the sum of 1*l.*, to be paid and applied according to law, and also to pay to the respondent the sum of 1*l.* 6*s.* for his costs in that behalf.

The questions for the opinion of the Court were: First, Whether or not the information was well laid, either on behalf of the Paving Commissioners or by the respondent individually; and such as the justices could adjudicate upon. Secondly, Whether or not a licensed alehouse is within the meaning of sect. 35 of The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89.(a)

Field, for the respondent.—First, the information was well laid on behalf of the Paving Commissioners; assuming that it was necessary that they should prefer it. The respondent, as their clerk, had a general authority to act for them in all matters connected with their *public duties; and, if a particular authority to lay the infor- [*699 mation was requisite, he derived it from their direction to him to publish the handbill which stated that the penalty imposed by sect.

(a) There was a third question, whether or not the evidence was sufficient to prove that the appellant had knowingly suffered common prostitutes to assemble at and continue in his premises within the meaning of the said section: with regard to which, *Keene*, for the appellant, now admitted that he could not deny that the evidence was sufficient.

35 of The Town Police Clauses Act, 1847, would be strictly enforced. The King's Lynn Waterworks and Borough Improvement Act, 1859, 22 Vict. c. xxxii., s. 120, enacts that "the justices by whom any penalty is imposed or (*sic*) recoverable under this Act, and which is not directed to be otherwise paid, shall award the same to be paid to the Corporation or to the Paving Commissioners, according as the proceeding for the penalty is taken on behalf of either of those bodies." The proceeding was taken on behalf of the Commissioners. If, however, the information is to be deemed to have been laid by the respondent individually, it was well laid. In Paley on Convictions (4th ed. by Macnamara), p. 58, it is laid down that "generally any person may be informer, but sometimes the statute giving the penalty allows only particular persons to inform." Sect. 120 of the local Act which is the only clause of it on which the appellant can rely, does not in effect restrict the right of informing to the Corporation and the Paving Commissioners, by the mere direction that the penalty is to be paid to them. Secondly, a licensed alehouse is a "place of public resort" "for the sale or consumption of refreshments" within the very general language of The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, s. 35. The note printed in the margin of the section, "Penalty on coffee shop keepers harbouring disorderly persons," insufficiently expresses the class of persons on whom the penalty is imposed. (He was then stopped.)

*700] **Keane*, for the appellant.—To take the last point first. Sect. 35 of stat. 10 & 11 Vict. c. 89, is not sufficiently comprehensive to include the case of a licensed alehouse. Victuallers, public-house keepers, and other persons licensed to sell wine, spirits, beer, cider, or fermented or distilled liquors by retail, to be drunk on the premises, are specified in sect. 34; it is therefore to be presumed that such persons are not affected by sect. 35, which contains no mention of them. [COCKBURN, C. J.—Sect. 35 is in wider terms than sect. 34. By sect. 34 victuallers and the other persons referred to, and no others, are made liable to a penalty for harbouring constables while on duty; but by sect. 35 "every person keeping any" "place of public resort" "for the sale or consumption of refreshments of any kind" is subjected to the penalty which that section imposes.] The marginal notes to the sections of an Act of Parliament are now printed on the roll, and are therefore to be deemed part of the Act: and the marginal note to sect. 35 shows clearly that that section refers only to coffee shop keepers. The keepers of licensed alehouses are subject to the provisions of stat. 9 G. 4, c. 61, by sect. 21 of which penalties are imposed upon them for offences against the tenor of their licenses. And persons licensed to sell beer come within the purview of stat. 11 G. 4 & 1 W. 4, c. 64, sect. 13 of which subjects them to penalties for permitting drunkenness or disorderly conduct in their houses. The fact that these two statutes remain in force shows that sect. 35 of The Town Police Clauses Act, 1847, can, at most, apply only to unlicensed houses for the sale of refreshments. That prostitutes and disorderly persons frequent coffee shops has been recently

*701] *brought to the notice of this Court in *Greig v. Bendeno*, E. B. & E. 133 (E. C. L. R. vol. 96). [CROMPTON, J.—Unless ale, beer, and spirits are not refreshments, it is impossible to say that the section

in question does not apply to licensed alehouses.] Secondly, the provisions of the local Act, 22 Vict. c. xxxii., sect. 120, by which the penalties recoverable under that Act are given to the Corporation or the Paving Commissioners of Lynn, according as the proceeding for the penalty is taken on behalf of the one or the other of those bodies, necessitate the laying an information on behalf of the Commissioners, in a case where the penalty is to go to them. A common informer may lay an information, if the statute under which it is laid gives him an interest in the penalty to be recovered: *Caswell v. Morgan*, 1 E. & E. 809 (E. C. L. R. vol. 102); but not otherwise. *Regina v. Hicks*, 4 E. & B. 633 (E. C. L. R. vol. 82), shows that where a statute directs a penalty to be paid to a particular party, a conviction founded on an information laid by a person unauthorized by that party cannot be supported. [COCKBURN, C. J.—That decision proceeded upon the narrow ground that the penalty in question was imposed, not for the benefit of the public, but for the protection of the persons to whom it was given.] *Rex v. Doman*, 2 B. & Ald. 378, is to the same effect. In *Miderton v. Gale*, 8 A. & E. 155 (E. C. L. R. vol. 35), although the Court held that any person might lay an information, under stat. 1 & 2 W. 4, c. 32, s. 30, for a trespass in search of game, the informer was, in fact, authorized by a party interested in the game. In the present case it does not appear that the respondent laid the information on behalf of the Commissioners. If he did so, he had no sufficient authority from them to act on their account. If he did not, [*702 he had no power, as an individual, to inform at all.

COCKBURN, C. J.—I am of opinion that this conviction should be affirmed. Mr. *Keane* has, I admit, raised considerable doubt in my mind whether the respondent had any sufficient authority to lay the information on behalf of the Paving Commissioners, if such an authority was necessary. The laying the information was not a matter necessarily within the scope of the powers of the Paving Commissioners, as such; the power to obtain penalties from persons guilty of certain offences was merely an advantage given to them, of which they might or might not avail themselves, according to circumstances. Though, therefore, their clerk might, in numerous instances of acts done by him which were within the scope of their duties, be considered as acting for them and with their sanction, the preferring an information was not an act of that description, nor had he a necessarily implied authority from his office to do it. The respondent has admitted that he had no authority, express or implied, from the Commissioners except that arising from his having published the notice by their direction; but that notice may have been intended only as a general warning, not to be acted upon by the Commissioners without further consideration. I am, however, of opinion, that, independently of any authority from the Commissioners, it was competent to the respondent to lay the information, so long as he professed to lay it in accordance with the direction of the local Act that the penalty was to enure for the benefit of the Commissioners. The case is not that of a grievance to an individual in respect of which a penalty is given by *stat- [*703 ute to the party aggrieved, by way of redress; but the offence is one against public decency and propriety. The General Act makes every person committing the offence liable to the penalty, and does

not prohibit any one, who may choose, from laying the information. The special Act engrafts upon this a special provision that the penalty, when imposed, shall go to one or the other of two specified bodies, according as the proceeding is on behalf of one or the other. The only restraint, therefore, put by the special Act upon the power of an individual to lay the information is that he must claim the penalty on behalf of one of the bodies named in that Act. The case is analogous to that where an informer is entitled to one half of a penalty and the Crown to the other. Such an informer must state that he claims the penalty as well on behalf of the Crown as on his own behalf; but he need show no authority from the Crown to lay the information. We should be bound by the decisions cited by Mr. *Keane*, were it not for the plain distinction between them and this case, that they turned upon the construction of statutes which imposed penalties for the protection of the private rights of individuals; whereas the enactment here in question is one for the benefit of the public at large.

(HILL, J., was absent.)

CROMPTON, J.—I am of the same opinion. I think that we may take it (though it does not clearly so appear from the case) that the information was laid on behalf of the Commissioners, and that the adjudication was that the penalty should be paid to them. The *704] respondent, however, it is said, had no express authority *from the Commissioners to move in the matter. What we have to look to is, whether what was done satisfied the requirements of sect. 120 of the local Act. I think that it did. When the clerk of a particular body comes and says that he sues or appears on their behalf, I do not think that he can be called upon to show his authority. He may be liable to his principals if he abuses his authority, but it would be quite a new thing to require him to prove that he has authority from them. The hand-bill, moreover, published by the respondent by the express direction of the Commissioners, is some evidence that he had their authority. On the other point made, there can be no doubt that The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, s. 35, applies to all houses, whether licensed or unlicensed, in which refreshments are sold to the public; and we cannot engraft upon it any exception, inasmuch as it contains no words of exclusion.

COCKBURN, C. J., added.—I omitted to allude to that point; upon which I am disposed to agree with Mr. *Keane* that the Legislature, having already provided for ale and beer houses, intended sect. 35 of the Act in question to be merely supplementary to those provisions. As, however, they have not guarded themselves by introducing words excepting ale and beer houses from the operation of the section, it is not competent to us to except them.

BLACKBURN, J., concurred on both points.

Conviction affirmed.

***KNOWLES, Appellant, v. DICKINSON, Respondent.** [*705
April 21.

Stat. 18 & 19 Vict. c. 108, s. 4, requires certain rules to be observed, in every coal-mine and colliery, by the owner and agent thereof. By rule 1, "an adequate amount of ventilation" is to "be constantly produced at all collieries" in order "that the working-places of the pits and levels of such collieries" may "under ordinary circumstances be in a fit state for working." Sect. 11 imposes a penalty upon the owner and agent "if" "any" "colliery be worked," and the aforesaid rules are neglected or wilfully violated.

Held, that the agent of a colliery which was actually worked only on week days, incurred a penalty under sect. 11 for a breach of rule 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night and Monday morning; for that, notwithstanding such suspension, the colliery was "worked" during that time within the meaning of that section.

CASE stated by justices, under stat. 20 & 21 Vict. c. 43.

At the Petty Sessions held at Bury, in Lancashire, on 18th November, 1859, an information was preferred at the instance of the respondent, Dickinson, Inspector of Coal-Mines for the district, against the appellant, Knowles, which charged that "within three months last past, that is to say, on 26th September, 1859, at Hagside Colliery, in the parish of Radcliffe, in the said county, Messrs. Knowles & Hall being the owners and occupiers of a certain coal-mine and colliery at Hagside aforesaid, the same being a coal-mine and colliery within the true intent and meaning of stat. 18 & 19 Vict. c. 108, intituled 'An Act to amend the law for the inspection of coal-mines in Great Britain,' Andrew Knowles" (the appellant) "the principal agent of the said coal-mine and colliery, did then and there unlawfully neglect and wilfully violate one of the rules to be observed in the said coal-mine and colliery, referred to in the said Act as the general rules, in not causing an adequate amount of ventilation to be constantly produced at the said coal-mine and colliery to dilute and render harmless noxious gases to such an *extent as that the working-places of the pits and levels of the said coal-mine and colliery should, under [*706 ordinary circumstances, be in a fit state for working; contrary to the" "statute" in that behalf.

The first general rule contained in sect. 4 of stat. 18 & 19 Vict. c. 108, is as follows.

"An adequate amount of ventilation shall be constantly produced at all collieries to dilute and render harmless noxious gases to such an extent as that the working-places of the pits and levels of such collieries shall under ordinary circumstances be in a fit state for working."

The appellant is one of the firm of Messrs. Knowles & Hall, the owners of the Hagside Coal Pit, and has the active management of that pit. To ventilate the pit, an air current descended the shaft at Hagside, was carried by means of the usual air-courses through the workings of the pit, and ascended an upcast shaft near the Hagside shaft. Air-pipes were also provided in parts of the pit, and a furnace and steam-engine were kept at work during the whole of the week, Sunday excepted. The furnace is solely for purposes of ventilation. The engine is used for drawing coal in the mine, and raising it from the pit, and for pumping water; and, when at work, likewise assists the ventilation. During the week, while the furnace and engine were kept constantly in operation the ventilation of the entire pit was ade-

testing the appeal; and, were the costs now to be paid by their successors, the auditor would disallow the payment, and they would be at the loss of the amount; for, even assuming that they could lawfully have made a rate on the parish to reimburse themselves, they can no longer do so, having now gone out of office. The overseers of a parish are not such a continuous body as that one set of them *715] are liable to fulfil all the obligations of their *predecessors. Stat. 11 & 12 Vict. c. 91, ss. 1 & 2, contain provisions for the discharge, by their immediate successors, of certain debts and liabilities incurred by overseers, which, however, do not affect the present case. [BLACKBURN, J.—The power to the Sessions to award costs to the successful party to an appeal against a poor-rate is given by stat. 17 G. 2, c. 38, s. 4, which puts such costs on the same footing as those in case of appeals concerning the settlement of paupers, under stat. 8 & 9 W. 3, c. 30; sect. 3 of which Act directs the Sessions to order the costs “to be paid by the churchwardens, overseers of the poor, or any other person, against whom” the “appeal shall be determined” to the party on whose behalf it is determined.] The order of Sessions, here, is practically made upon the overseers as individuals; they having no power to charge the parish funds with the payment of these costs. Unless the order is set aside, it can be enforced only by a fi. fa. against the goods of the overseers. [COCKBURN, C. J.—The order was not made upon the overseers as individuals; and it is their own fault if they have not complied with it while they remained in office, with power to make rates on the parish to recoup themselves.] They could not have made a rate to defray charges for which the parish were not liable. At all events the railway Company were guilty of laches in not demanding payment from them till the December following the order, which was made in April. [CROMPTON, J.—It does not appear that a rate might not have been made, after that time, before the applicants’ term of office expired.] It must be admitted that there was time to have made a rate, if it could have been lawfully made. [COCKBURN, C. J.—Why did the applicants allow the six months, after the making of the order, to *716] elapse, during *which they might have brought it up by certiorari, with a view to its being quashed?] In *Regina v. Hyde*, 21 L. J. N. S. M. C. 94, this Court entertained objections to the validity of a conviction, although it was made under an Act by which the certiorari was taken away. [CROMPTON, J.—The objection there was that the conviction was bad on the face of it.] When an order has been brought before the Court for the purpose of being enforced, it may be objected to as illegal: *Regina v. Hellier*, 17 Q. B. 229 (E. C. L. R. vol. 79); *Regina v. Huntley*, 3 E. & B. 172 (E. C. L. R. vol. 77). At all events, the order of Sessions of 4th April, 1859, ought not to have included the costs incurred up to the Epiphany Sessions. [COCKBURN, C. J.—The order of April, 1859, is independent of that which was made at the Epiphany Sessions.]

COCKBURN, C. J.—I am of opinion that there should be no rule. The facts are, simply, that a poor-rate was made by the then churchwardens and overseers, on behalf of the parish of Fletton; that the rate was appealed against by the Eastern Counties Railway Company; that, while the appeal was pending, there was a change in the churchwardens and overseers of the parish, and that the present applicants

came into office upon that change. After they came in, the appeal was disposed of at the Quarter Sessions; the rate being quashed, the appeal allowed, and an order made on the respondents to pay costs to the appellants. It is said, on behalf of the applicants, that, as there was a change of parish officers pending the appeal, and the incoming officers took no part in it, but allowed judgment to go by default, they ought not to be considered as being in any way parties [*717] to the proceedings. To refuse, however, on that ground, to enforce the order of Sessions, would be to adopt a course fraught with great inconvenience. The applicants knew that the order had been made, but allowed the ensuing six months to elapse within which they might have brought it up by certiorari. Moreover, payment was demanded of them, and they have had abundant time within which they might have paid, and have made a rate to reimburse themselves. Instead of doing so, they wait till they have quitted office: and when the appellants seek to enforce the order of Sessions giving them their costs, the endeavour is made to deprive them of the benefit of it by a juggle, contrived by those who ought to have paid the costs, but who now say that they are not persons against whom the order can be enforced. We ought not to do that which would practically amount to annulling the order. The applicants are the only persons against whom it can properly be enforced.

CROMPTON, J.—The application to me for the order which I made was an ex parte proceeding, behind the backs of the parish officers, who ought now to stand in the same position as if they had been before me at Chambers; and the question is, whether they are the parties against whom the order of Sessions can be enforced. With regard to that order, the time for questioning it by means of a certiorari having gone by, we are bound to assume that it was rightly made. Still, although that time has elapsed, I do not say that we should be bound to enforce the order, if either it was bad on its face, or there had been any laches on the part of those applying to enforce it. In my judgment, however, the order of Sessions was perfectly right; and, being *good on its face, it cannot be questioned, within [*718] the principle of the decisions which have been cited to us. Nor can we go into the question of the amount at which the costs were taxed. Nothing appears to show that the order was in excess of the jurisdiction of the Sessions. Then the question is, ought a Judge at chambers to have made an order to enforce it? Had the appellants allowed the matter to stand over, and not demanded payment of the costs from the present applicants, the parish officers, till just before the latter went out of office, the applicants might have had some ground for urging that this was such laches on the part of the appellants as to deprive them of the right to ask for the interference of this Court. But it does not appear that the demand was thus postponed; and Mr. *Field* was obliged to admit that the appellants had not been guilty of any such laches. The rule must, therefore, be refused.

HILL, J.—I think that there should be no rule. I wish it to be distinctly understood that I do not decide whether or not the railway Company can have execution for their costs under the order of Crompton, J. There was an appeal by the Company against a poor

rate, which came on to be heard at the January Sessions, and was, upon the application of the respondents, the then churchwardens and overseers of the parish of Fletton, adjourned till the following Sessions. On 29th March, and before the following Sessions, the present applicants came into office as churchwardens and overseers of the parish. The Sessions were held on 4th April, when the appeal was heard, the rate quashed, and an order made by the Court, allowing full costs to the appellants, to be paid by the respondents, that is, by *719] the parties described *in the order, not by name, but as "the churchwardens and overseers of the parish of Fletton." The appellants took no steps to enforce this order till the following December, when they demanded payment from the present applicants. That being refused, no further steps were taken until March in the present year, when the appellants obtained Crompton, J.'s, order for the order of Sessions to be brought into this Court to be enforced. The applicants, having now gone out of office, come here to ask us to set aside both orders. But the order of Sessions is good upon its face. I have heard of no ground not apparent on its face, for supposing it to be bad; but I think that we could not inquire into its validity, except upon some matter apparent upon its face. The order of Crompton, J., is also perfectly correct. We cannot, therefore, grant Mr. *Field's* request. When an attempt is made to enforce the orders, that will give rise to other matters for consideration. The orders are not made against the applicants as individuals, and the Court may possibly say that the appellants have not come before us, to enforce them, with sufficient promptitude. There will be time enough to decide that question when it arises; at present all that we say is that both orders are unobjectionable, and cannot be set aside.

BLACKBURN, J.—I am of the same opinion. I wish to confine my judgment to the same ground on which my brother Hill has rested his; namely that, both orders being unobjectionable on their face and, as far as I can see, in substance, they cannot be set aside. The order of Sessions, of April, 1859, was made in an appeal in which the churchwardens and overseers of Fletton were respondents, and awarded *720] them to pay full costs to the *appellants. The order directed those costs to be taxed; and they have been taxed accordingly. It is said that the amount at which they were taxed is in part made up of some interlocutory costs. That, however, is not an objection to the order, but one which could have been made, if at all, at the taxation, and into which we cannot now inquire. The power of the Sessions to give costs of the appeal arises under stat. 17 G. 2, c. 38, s. 4, which empowers them, at the determination of the appeal, to award costs in the same manner as upon settlement appeals under stat. 8 & 9 W. 3, c. 30; under sect. 3 of which costs may be awarded to be paid to the party on whose behalf the appeal is determined "by the churchwardens, overseers of the poor, or any other person, against whom such appeal shall be determined." It seems to me that the order was properly made against the persons who were the churchwardens and overseers of the parish at the time when it was made. The proper time for them to object to it being put in force against them will be when that is attempted to be done. If the railway Company have been lying by improperly, I should be sorry to be obliged to

say that we were bound to enforce the order. It appears to me, at present, that, so far from lying by, the Company have taken every available means to obtain payment. That, however, is not the question before us; all that we now say is that the rule for which we are asked cannot be granted. Rule refused.

***ELIZABETH WRIGHT v. STAVERT.** *April 24.* [*721

By a parol agreement between plaintiff, a boarding-house keeper, and defendant, defendant agreed to pay plaintiff, for the board and lodging of himself and man, and accommodation for his horse, at the boarding-house, 200*l.* a year from a fixed day; the agreement to be terminable by a quarter's notice on either side.

Plaintiff having sued defendant for a breach by him of this agreement, in refusing to become an inmate of the boarding-house: Held that, though the agreement was unwritten, the action was maintainable; for that the contract was not one for any interest in or concerning land, within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3.

THIS was an appeal from the decision of the Judge of the County Court of Lancashire, holden at Salford.

The action was brought in that Court by the plaintiff against the defendant to recover the sum of 50*l.*

The particulars of the plaintiff's claim, annexed to the plaint note, were as follows:—

Thomas Stavert to Elizabeth Wright, Dr.

		£.	s.	d.
1859.				
January 1st,	One quarter of a year's lodging and			
to	board, and for breach of contract	52	10	0
March 31st.	Excess over 50 <i>l.</i> abandoned.			

On the trial the plaintiff deposed as follows:—

That she kept a boarding-house; that, having a vacancy, she advertised it in the Manchester newspapers; terms, 100 guineas a year for board and lodging. In consequence of this advertisement, the defendant wrote to her a letter of inquiry as to the particulars, to which she replied by letter, and appointed the time for an interview on the subject. The defendant came to her house at the time appointed, and said he was recommended to her by a Mr. Brown. The defendant inquired as to the particulars, and the inmates of the establishment; and, having been informed of the terms, and that there were two foreign gentlemen then boarding there, he observed that he disliked associating with foreigners, but that he would think the matter over and write to the plaintiff. The terms stated to the defendant were *100 guineas for a year, terminable by a quarter's notice on either side. Not having heard from the defendant as soon as she expected, the plaintiff sent a letter to him asking for his decision. In two or three days after this she received a letter from him, saying he would call on 6th December. He came accordingly, and said his time or engagement at the Queen's Hotel would expire on 1st January, and that, besides accommodation for himself, he wished to have accommodation for his horse and valet. The plaintiff said, the foreign consul, who was one of her inmates, had a horse and man, and altogether paid her 200*l.* a year. The defendant said money was no object, and then agreed to pay for the board and lodging of himself and man, and

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accommodation for his horse, 200*l.* a year, from 1st January, 1859. He also agreed to a quarter's notice, as originally proposed. The plaintiff then ordered furniture, and went to a considerable expense in preparations for the defendant, his horse and man. She declined an offer made to her by a gentleman, of 170*l.* a year, not having room after this engagement. On 20th December, the defendant wrote her the following letter, declining the engagement.

"Madam, "Queen's Hotel, 20th December, 1858.

"I take the earliest opportunity of informing you that, since I had the pleasure of waiting upon you last Monday, I regret to say certain business arrangements have been made which will prevent me carrying out for the present my intentions in reference to your apartments, and I hope you will not be inconvenienced thereby. Should I remain in England I may again trouble you with a visit. Meantime,

"I remain, Madam,

"Mrs. Wright,

"Yours respectfully,

"Whalley Range."

"THOMAS STAVERT."

*723] *In cross-examination the plaintiff stated that, at the second interview, there was no conversation about foreigners or a private room for the defendant. That she kept a boarding-school for young ladies, as well as a boarding-house, in the same dwelling-house. That there were six or eight young ladies and two gentlemen boarders at the time the defendant called; that she did not recollect that the defendant asked for a private sitting-room; that she had laid out 30*l.* in preparation for the defendant's coming, in furniture and other things, and that the defendant was to have no exclusive right to, or interest in, any particular rooms, but to be considered simply as a boarder and an inmate.

The defendant's counsel applied for a nonsuit on three grounds. First, That the agreement, as proved, gave an interest in lands, and, not being in writing, no action could be maintained upon it; Secondly, That it was void for uncertainty in its terms; and, Thirdly, That there was no evidence of a contract at all.

The Judge, however, declined to nonsuit.

The defendant was then examined. He stated that he saw the advertisement and called on the plaintiff to make inquiries. He called upon her twice. On both occasions he said he must have a private sitting-room. On the second interview he repeated that he must have a private sitting-room. The plaintiff said he could not. He said it was indispensable; upon which he left, and she was to consider of it and let him know. Before hearing from her, he wrote her the letter of 20th December. He never looked at the plaintiff's rooms, and never made any contract at all with her respecting them; what took place was mere matter for future consideration.

*724] *On cross-examination the defendant was shown his letter of 20th December, and he said that the admission in that letter was a mere matter of politeness.

This was all the evidence, and the Judge, considering the statement of the plaintiff to be correct in fact, and that the contract as proved was a valid contract in law, gave judgment for the plaintiff.

The defendant gave notice of appeal on the following grounds. First, That the Judge determined that the agreement on which the

action was brought was a valid agreement, and one on which an action could be brought; whereas the agreement conveyed an interest in land and was required by law to be in writing. Secondly, That the agreement was an agreement which was required by law to be by deed.

The questions for the opinion of the Court were, First, Whether the agreement on which the action was brought was a valid agreement and one on which an action could be brought, and whether the agreement did not convey an interest in land, which is required by law to be in writing. Secondly, Whether the agreement was or was not an agreement which is required by law to be by deed.

T. Jones (Northern Circuit), for the appellant, the defendant.—The agreement was a contract for an interest in land, within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3, and was therefore void, not being in writing. The case is not distinguishable from *Inman v. Stamp*, 1 Stark. 12 (E. C. L. R. vol. 2), where an agreement to occupy lodgings at a yearly rent, payable quarterly, the occupation to *com- [*725 mence at a future day, and possession not having been taken, was held to be within the statute. [HILL, J.—That was an agreement for a tenancy, and, if executed by entry, would have amounted to a demise: which the agreement in the present case would not. CROMPTON, J.—The agreement, here, merely was that the defendant should become an inmate of the house, not that he should have the exclusive occupation of specific rooms in it.] It does not appear that, in the arrangement in *Inman v. Stamp*, 1 Stark. 12, (E. C. L. R. vol. 2), any particular rooms were specified. [HILL, J.—It is clear that that was an agreement for the exclusive occupation of the lodgings at a fixed rent. BLACKBURN, J.—And that the lodger might have maintained trespass against an intruder.] There is no real distinction between that case and the present. *Edge v. Strafford*, 1 C. & J. 391,† which was an action for not taking possession of apartments alleged to have been let by the plaintiff to the defendant, is also strongly in point for the present defendant. In that case the agreement amounted to a parol lease of lodgings for less than three years from the making thereof; valid, as such, under sect. 2 of the statute: and, had the defendant entered under it, the plaintiff might have resorted to a remedy upon it in its character of a lease. But it was held that the defendant, until entry, had a mere *interesse termini*; and that the action did not lie, inasmuch as, until entry, the fourth section applied to the agreement, as being one for an interest in land. [CROMPTON, J.—Suppose that, in engaging a governess, I verbally agree to let her have a room to herself. If I break this agreement can it be said that she has no remedy because the agreement was concerning *an interest in land?] The permission [*726 to her to use the room would be collateral to the agreement, which would be a mere contract of hiring. [CROMPTON, J.—Did the plaintiff, here, do anything more by the agreement than give the defendant a personal license to come and live upon her premises?] In that view of the case the license ought to have been granted by deed, the privilege granted amounting to an easement: *Wood v. Lead-bitter*, 13 M. & W. 838.† In *Monks v. Dykes*, 4 M. & W. 567,† it was held that a lodger, occupying one room in a house, the key of the outer door being kept by the landlord, could not justify, as being

in possession of a dwelling-house, turning out one who disturbed him in his possession. Lastly, the contract, although for board in addition to lodging, is entire and not to be separated; if, therefore, any part of it ought, under sect. 4 of the statute, to have been in writing, the statute applies to the whole of it, and the whole is void: *Mechelen v. Wallace*, 7 A. & E. 49 (E. C. L. R. vol. 34).

Wheeler, contra, was not called upon.

COCKBURN, C. J.—I am of opinion that the County Court Judge was right in point of law. In this case an interest in land was not, as in *Inman v. Stamp*, 1 Stark. 12 (E. C. L. R. vol. 2), granted or intended to be granted by the contract between the plaintiff and the defendant. The plaintiff, keeping a boarding-house, agreed to receive the defendant as an inmate of it, and to give him, in the capacity of an inmate, an incidental enjoyment of the house to a limited extent; so that the contract amounted to no more than a permission to the defendant to *727] come and *reside in the house. It is unnecessary to decide whether, if the defendant had become an inmate of the house and the plaintiff had then revoked the personal license to him to do so, implied in the contract, and had turned him out, he could have maintained an action of trespass against her; or whether he would, by reason of the decision in *Wood v. Leadbitter*, 13 M. & W. 838,† have failed in such an action. It is clear that, in the case supposed, he could have successfully maintained an action for the breach of the contract, and equally clear that he is himself liable to the plaintiff for a breach of it on his part. The decisions under the fourth section of the Statute of Frauds have gone quite far enough, and it would lead to most absurd and inconvenient consequences were we to hold that such a case as this falls within that section.

CROMPTON, J.—I am of the same opinion. I think that there was evidence before the County Court Judge which warranted him in finding, as he did, that no interest in land passed by the contract between the parties. The contract was merely that the defendant should become an inmate of the plaintiff's establishment; it was not intended to create the relation of landlord and tenant, or to give the defendant the exclusive occupation of any part of the house. As far as the defendant's occupation of the premises was concerned, the plaintiff might, in my opinion, have turned him out at a moment's notice after he had entered, without becoming liable to him in trespass in consequence; though he might, under such *728] circumstances, have sued her for a breach of the contract. The cases relied upon for the defendant are distinguishable on the ground that, in them, there was an agreement which, if perfected by entry, would have amounted to a demise, and therefore, pending entry, gave to the person entitled to enter an *interesse termini* which, as being an interest in land, fell within the requirements of the 4th section of the Statute of Frauds. I agree with the Lord Chief Justice that to hold the contract in the present case to be one for an interest in land would be to give rise to great absurdity and inconvenience, and to carry the decisions much farther than we have any right to do.

HILL, J.—I am of the same opinion. This agreement seems to me not to be a contract for any interest in or concerning land, within the 4th section of the Statute of Frauds. If the defendant had entered

into occupation of the house, he could have had no action of trespass for an interruption of his occupancy by the plaintiff. In *Inman v. Stamp*, 1 Stark. 12 (E. C. L. R. vol. 2), and *Edge v. Strafford*, 1 C. & J. 391,† on the contrary, the tenant could, if he had taken possession, have brought trespass or ejectment for a disturbance of his possession. The defendant's position, here, is directly analogous to that of a domestic servant, or a governess, or a person employed to build a house upon another's land; all of whom have a right, incidental to their respective contracts, to go upon land in order to carry out their contracts; but none of whom take, under their contracts, any interest in the land upon which they are thus entitled to go.

*BLACKBURN, J.—I am of the same opinion. The best test [*729 of the nature of the contract is to see whether, had it been carried out instead of remaining executory, the defendant would have had a right to maintain a possessory action of some sort, if his possession and enjoyment of the premises had been afterwards interfered with. In *Inman v. Stamp*, 1 Stark. 12 (E. C. L. R. vol. 2), and *Edge v. Strafford*, 1 C. & J. 391,† the respective agreements, if executed by entry, would have amounted to actual demises, and would have given the occupiers all the possessory rights of tenants. But in the case before us the defendant, after entry, would not have become the occupier or tenant of any particular rooms in the plaintiff's house. The contract was not that he should have the exclusive possession of any rooms; but that the plaintiff should take him as an inmate into, and provide for him in, her rooms. I think, therefore, that the County Court Judge was right. Judgment affirmed.

*FOLLIT, Appellant, *v.* KOETZOW, Respondent. April 25. [*730

Stat. 7 & 8 Vict. c. 101, s. 3, enacts that, upon the hearing by justices of a summons taken out by the mother of a bastard child against the putative father, the justices "may" "if they see fit, having regard to all the circumstances of the case," make an order for the payment by the putative father to the mother of a weekly sum not exceeding 2s. 6d. Sect. 5 alludes to this order as an "order for the maintenance or support of" the "bastard child," and provides for the payment of the weekly sum to a person to be appointed by the justices, instead of to the mother, in case of her death, lunacy, imprisonment, or sentence to transportation.

At the hearing by a Metropolitan Police Magistrate of an application by respondent, the mother, against appellant, the putative father, of a bastard child, for an order under sect. 3, it appeared that, prior to the application, appellant had contracted with respondent to pay her 5s. per week for the support of the child, had performed this contract for some time, and had then paid respondent in advance for another two years, of which a year and a half were still unexpired. At the time of making the payment in advance, he had also paid her the further sum of 10l., in consideration of which she had then agreed to release him from all further payments in respect of the child.

The magistrate, being of opinion that the contract was void in law, and ought not to be taken into consideration, made an order for the payment of 2s. 6d. weekly to respondent by appellant.

On appeal, held, first, that the contract was not void in law; but that neither it nor the release were a bar to the magistrate's jurisdiction to make the order, such order being, under the statute, for the benefit of the child, and not of respondent exclusively. Secondly, that the magistrate, in exercising his discretion whether or not to make the order, ought to have taken the contract into consideration as one of the circumstances of the case; which was accordingly remitted to him for the purpose of his doing so.

CASE stated by a Metropolitan Police Magistrate, under stat. 20 & 21 Vict. c. 43.

This was an application made by Susannah Koetzow for an order, under st. 7 & 8 Vict. c. 101, to compel George Follit to maintain a certain bastard child, of which the said Susannah Koetzow had been delivered on 24th January, 1856, and of which child the said George Follit was alleged by her to be the putative father. Upon the hearing of a summons issued by me on 28th May, 1859, calling upon the said George Follit to show cause why he should not be adjudged the putative father of such child, the complainant, Susannah Koetzow, swore that he was the father of such child, and that he had made payments to her for the maintenance of such child within twelve months from its birth; which facts were *admitted by the said defendant. I *731] thereupon made the usual order to pay two and sixpence per week for the maintenance of such child. The defendant's attorney then contended that the defendant was not liable to maintain such bastard child, and that no order could be made for the maintenance of such child, for the reason that the said defendant, previously to 23d October last past, had contracted to pay to the said complainant the sum of five shillings per week for the support of the said child; which contract he alleged he had performed up to 23d October last past, and had paid her in advance sufficient to maintain the said child for two years then to come; and also that the said defendant had, on such last-mentioned day, paid to the said complainant the further sum of 10*l.*, in consideration of which the said complainant had, as he stated, agreed to release the said defendant from all future payments in respect of the said child. I thereupon stated my opinion to be that such contract was void, as against public policy, and I could not entertain it; but I promised to consider the point and give judgment on 14th June last past. On said 14th June last, the said defendant's attorney again appeared before me, and urged that, even if such contract was not binding between the parties, yet I could exercise my own discretion in the matter, inasmuch as the Act of Parliament required me to decide after considering all the circumstances of the case; and that I might be influenced by the fact that the father had paid more than double what I had power to order, for the next four or five years. Being of opinion that I had no discretion in the matter, as the defendant was proved to be the father of the said child, *732] I refused to alter my determination. I *felt strengthened in that determination by it seeming to me clear that all the clauses relating to bastards in stat. 7 & 8 Vict. c. 101, have but one object, namely, the maintenance and protection of the child; and therefore this contract to pay, or the having paid, a sum of money to the mother, which may be expended or lost long before the child reaches the age when the weekly payment under a magistrate's order ceases, is of no avail. The mother is only the guardian of the child, and, under some circumstances, another guardian may be appointed. It seemed to me that the child, and the parish to which it might become chargeable, ought to be my first consideration; and that the payment of a sum of money to the mother was no answer to my assuming jurisdiction. I therefore made the order.

The question for the consideration of the Court is, Had I any dis-

cretion, under the Act of Parliament, to entertain the said contract attempted to be set up by the said defendant as aforesaid, the paternity of the said child having been proved to my satisfaction?

Coleridge, for the respondent.—Two questions, in effect, arise for the consideration of the Court. First, whether the contract between the appellant and the respondent was void in law, or, if not void in law, was a bar to the jurisdiction of the magistrate to make the order. Secondly, whether, if the contract was good in law, and was not a bar to the magistrate's jurisdiction, he ought to have taken it into his consideration, as one of the circumstances of the case, in exercising his discretion whether or not to make the order. First, the contract was neither void in law, nor was it a bar to the *magistrate's jurisdiction. *Middleham v. Bellerby*, 1 M. & S. 310 (E. C. L. [*733 R. vol. 28), and *Pope v. Sale*, 7 Bing. 477 (E. C. L. R. vol. 20), show that the contract was not void as against public policy. Nor is there anything in the contract to bar the magistrate's jurisdiction to entertain an application by the mother for an order on the putative father to make the payment provided for by stat. 7 & 8 Vict. c. 101. By making such an application the mother may possibly put an end to her right of action against the putative father on the contract; for the contract would probably be construed as founded on the consideration that the mother would undertake the sole maintenance of the child without affiliating it: *Crowhurst v. Laverack*, 8 Exch. 208.† But, as that case also shows, the mother may, if she chooses, obtain an affiliation order, notwithstanding the existence of such a contract. [CROMPTON, J.—It is, certainly, difficult to see how the fact that the mother, by applying to the magistrate, commits a breach of contract, can take away the magistrate's jurisdiction to entertain her application.] By stat. 7 & 8 Vict. c. 101, s. 3, the only facts necessary to give the justices jurisdiction are the appearance of the person summoned, or proof of due service of the summons upon him, and the corroboration of the evidence of the mother, in some material particular, by other testimony, to their satisfaction. Upon these conditions being complied with, the justices may adjudge the man to be the putative father of the child; and, "may also, if they see fit, having regard to all the circumstances of the case," make an order on the putative father for maintenance and costs. This shows, secondly, that the justices may take the contract between the father and mother of the child into consideration, in *exercising their discretion [*734 whether or not to make the order. [COCKBURN, C. J.—The manner in which the contract has been performed may be a very material element for their consideration. It may be, on the one hand, that the child has been left in a state of destitution by the father's omission to pay the stipulated weekly sum; or, on the other, that he is paying that sum regularly and that, notwithstanding it is amply sufficient for the child's support, the mother is endeavouring, by means of the summons, to extort more money from him.]

Parry, Serjt., contra.—The release given by the respondent to the appellant, as stated in the case, was a bar to the appellant's right to apply to the magistrate for an order under stat. 7 & 8 Vict. c. 101, s. 3. That enactment was passed for the benefit, not of the child, but of the mother, who is the only person whom it empowers to apply

for the order, and to whom alone the payments, under the order, are to be made, so long as she continues free from the various kinds of incapacity mentioned in sect. 5. Her remedy against the putative father, under the statute, is in the nature of a civil remedy, and one which it is as competent to her to bar by a release as though it arose under a contract between her and the father. That an application made by the mother under stat. 7 & 8 Vict. c. 101, s. 3, is to be deemed to be made for her own benefit, is plain from the consideration that, by stat. 4 & 5 W. 4, c. 76, s. 71, she is bound to maintain the child till it attains the age of sixteen, and relief granted to the child while under that age is to be considered as granted to her. She, in fact, has the absolute control of the child, and an absolute discretion whether *735] or not to apply for the order; it being *only in the event of her death or incapacity that the parish officers may intervene under sect. 7 of stat. 7 & 8 Vict. c. 101. The circumstance that, under sect. 3, the putative father may be examined as a witness for himself, tends further to show that the proceedings against him are of a civil nature. If an order is made upon him to pay the mother the half crown per week, the money is as much hers as if she had recovered it in an action. [COCKBURN, C. J.—If the money is hers, how is it that sect. 5 provides that, if she is insane, in prison, or under sentence of transportation, the payments under the order are to be made to some person appointed by the justices?] She is merely incapacitated from receiving the money during the continuance of such a state of things: but the money is still hers. In *Smith v. Roche*, 6 C. B. N. S. 223, 233 (E. C. L. R. vol. 95), where it was held that an agreement similar to that in the present case was binding on a putative father, Cockburn, C. J., in giving judgment, said, "The woman has a right to call upon the father to contribute to the support of his illegitimate offspring. Now, this contract would practically have the effect of depriving her of this latter advantage. Stat. 7 & 8 Vict. c. 101, ss. 2, 3, and 6, secure to the mother assistance from the father, provided she is unable to maintain the child herself. She may go before the magistrate for an order upon him for that purpose; but the making of that order is in the discretion of the magistrate, and is to be exercised by him with a due regard to all the circumstances of the case, one of which circumstances would be the ability or nonability of the mother to support the child herself; another would be whether or not *736] the father had already *made provision for that purpose. It would be monstrous to suppose that the magistrate, when he found that the father had already made a sufficient provision for the maintenance of his illicit offspring, should allow him to be harassed by an order of affiliation." [CROMPTON, J.—That is no authority to show that the agreement would be a bar to the jurisdiction of the magistrate to hear an application by the mother for an order. It goes only to this, that, at the hearing of such an application, the magistrate ought to take the agreement into account, in considering the question of the mother's ability to maintain the child.] In the present case there was not only an agreement but a release to the appellant by the respondent, before she applied for the order, from all further payments in respect of the child. That is tantamount to an express

agreement by her, founded on good consideration, never to apply for an affiliation order; and to that agreement she ought to be held.

Coleridge was not called upon to reply.

COCKBURN, C. J.—With regard to the main question which we have to decide, I am of opinion that what has taken place between the mother of the child and the putative father was not sufficient to oust the magistrate of his jurisdiction under stat. 7 & 8 Vict. c. 101. The statutory rights given to the mother and to the justices are of a peculiar character. There can be no doubt that, as the law now stands, it is left quite in the choice and discretion of the mother of an illegitimate child whether she will come forward before the justices and apply for an order against the father. If she does not choose to do so, no one can compel her; and, therefore, *it [*737 would appear, at first sight, that the order and the payments thereunder were intended for her own peculiar and personal benefit. When, however, we look to the object of the Legislature, we see that that narrow view of the effect of the statute cannot prevail. Many reasons might be assigned why it should be left to the option of the mother to apply for the order; but, on the other hand, the Legislature clearly intended that, when the order was once made, the payments under it should not be applied merely for the relief of the mother, but should also operate for the ulterior object of the maintenance of the child. In sect. 5 of the Act the order is spoken of as one “for the maintenance and support of” the “bastard child.” I think that the magistrate went too far, in this case, in holding the agreement between the mother and the putative father to be void. The agreement was not void, and we do not say that an action cannot be maintained upon it. What we have to decide is, whether it bars the jurisdiction of a magistrate to entertain an application by the mother under stat. 7 & 8 Vict. c. 101, s. 3. Under that section the magistrate is empowered to make an order on the putative father for the child’s maintenance, “if” he shall “see fit, having regard to all the circumstances of the case.” There is nothing whatever in the Act to show that it was intended that this discretionary power should be taken away, upon proof being given that an agreement, such as the present, had been made between the mother and the putative father; and I think that such an agreement has not the effect of ousting the magistrate’s jurisdiction. If the right to obtain the order was so exclusively the personal right of the mother that she could, by giving a release to the putative father, deprive the magistrate of *jurisdiction to make the order, it would follow that she might [*738 also, by giving such a release after the order had been made, annul the order. But that, it is clear, she cannot do; for, by sect. 5, if she becomes lunatic, or is put in prison, or is sentenced to transportation, the justices may appoint another person to receive the payments under the order. While, however, I am of opinion that the agreement does not oust the jurisdiction of the magistrate, I think that it is a material circumstance in the case for his consideration. It may be that he may find the sum secured by it to be of itself ample for the maintenance of the child; or that the mother has other means, taken with which it is sufficient for that object. Or it may be that he may think that the man has acted imprudently in giving the

woman a lump sum, and the woman improvidently in spending it; and that the child is, practically, left destitute. The case must go back to the magistrate, that he may, in exercising his discretion whether or not to make the order, take the agreement into his consideration, as one of the circumstances in the case.

CROMPTON, J.—I am entirely of the same opinion. The points for our consideration resolve themselves into two: first, whether the agreement between the mother of the child and the putative father was a bar to subsequent proceedings by her before the magistrate; and, secondly, whether the magistrate has discretion to take that agreement into consideration, together with the other facts of the case. I rather think that the magistrate was of opinion that the agreement was not a bar to his jurisdiction; and I consider that he was right in that view. The Act empowers the mother, after certain *739] preliminaries *and within a certain time, to go before the magistrate and make an application for an order on the putative father to pay her a weekly sum towards the child's maintenance. There are no words in the statute to the effect that, if an agreement for the maintenance of the child has theretofore been made by the father with the mother, the magistrate shall have no jurisdiction to proceed in the matter. All that is enacted is, that he is to make the order "if" he shall "think fit, having regard to all the circumstances in the case." The object of the statute appears to me to be that the mother shall have at all events a small sum paid her weekly, to be applied by her to the maintenance of the child. My brother *Parry* says that it is competent to the mother to release her right to this payment. It is true, certainly, that "quilibet potest renuntiare juri pro se introducto;" but the question is, whether the statutory right is given exclusively to the mother, or is intended also for the benefit of the child, to prevent it from starving. I think that the Legislature contemplated the benefit of the child as well as that of the mother. In sect. 5, the order is alluded to as an "order for the maintenance or support of any such bastard child;" and sect. 7 provides that if, after the death of the mother, the child becomes chargeable to the parish, the order may still be enforced against the putative father; and the payments due under it are then to be made by him to a person appointed by the justices. The magistrate, here, appears to have treated the agreement between the parents as void; but it was void only to this extent, that it was no bar to an application by the mother for an affiliation order. Even at common law it does not follow that a contract not to do a thing is a bar to the thing being *740] done; a contract not to sue, for instance, *often does not bar a suit. Possibly, in the present case, the putative father may sue the mother for her breach of the agreement in applying for an order, though the damages recoverable would be slight. But to hold that the previous receipt by the mother of payments from him on account of the child's maintenance, and, still more, of payment of a lump sum, precludes the magistrate from inquiring into the present means of the mother to maintain the child, would be exactly contrary to the policy of every word in the statute. The case must go back to the magistrate for the proper exercise of his discretion.

HILL, J.—In this case it is admitted on both sides, and the cases

which have been cited show, that the agreement between the mother and the putative father is good in law; but the question is, whether the existence of that agreement takes away the power of a magistrate to make an order on the putative father. In order to decide this question it is necessary to see what is the power which the magistrate has. Now stat. 7 & 8 Vict. c. 101, s. 3, empowers him to do two things. First, upon certain proof being adduced, to adjudge the man summoned before him to be the putative father of the child. The statute gives him no discretion as to this. Secondly, he may, if he "see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father." This leaves it entirely in the discretion of the magistrate to consider whether, under all the circumstances of the case, he will make the order; and there are no words to show that he is, under any circumstances, to be precluded from making the order if he thinks fit. The agreement was, however, a strong fact which the magistrate ought to have regarded, with the *other circumstances; and by his disregard of it there has clearly been a miscarriage of justice, for the remedy of which [*741 the case must go back to him.

BLACKBURN, J.—I am of the same opinion. There is nothing in the statute to show that the mother can release or bar her right to proceed under it; if, however, it had appeared from all the provisions, taken together, that the statutory benefit was intended to be conferred on her exclusively, I should have been inclined to think that she might have been precluded by the agreement from availing herself of the statutory remedy, on the ground mentioned by my brother Crompton, that "*quilibet potest renuntiare juri pro se introducto.*" But, when I look at the Act, I see that the order is not to be made solely for the personal benefit of the mother. Under sect. 3, the putative father is to be ordered to make a weekly payment to her. In that section it is not stated, though it might be implied, that this payment is to be for the maintenance of the child. But sect. 5 provides for the payment being made to a person appointed by the justices, in case the mother dies, becomes lunatic, is in prison, or is sentenced to transportation. This shows as clearly as possible that the object of the payment is to be the maintenance of the child: and, indeed, lower down in the same section, the order is styled an "order for the maintenance or support of" the child. The payment, therefore, not being made solely for the mother's benefit, she cannot renounce the right to it. In sect. 3 the Legislature says that the justices may make the order "if they see fit, having regard to all the circumstances of the case." The intention therefore was that a discretion should be exercised as to making the order, *upon a consideration of all [*742 the facts. In the present case, the magistrate thought that he was precluded from taking the agreement into consideration as one of the facts. In that, I think, he was wrong; and the case ought to go back to him, in order that he may exercise his discretion in the proper manner.

Case sent back to the magistrate.

The Parish of St. PANCRAS, MIDDLESEX, Appellants, v. The Parish of CLAPHAM, SURREY, Respondents. April 25.

An attorney's clerk, articulated by indenture, is an apprentice within the meaning of stat. 3 & 4 W. & M. c. 11, s. 8; and, as such, gains a settlement under that statute in the parish in which he inhabits while serving under his articles.

CASE stated, by order of Crompton, J., under stat. 12 & 13 Vict. c. 45, s. 11.

By an order of removal, made by two justices of the county of Surrey, Thomas Brown was ordered to be removed to the parish of St. Pancras, Middlesex, as the place of his last legal settlement.

The churchwardens and overseers of St. Pancras gave due notice of appeal against the said order. The ground of removal was that the pauper was the illegitimate child of one Douglas Brown, single woman, and that he was born in the parish of St. Pancras in 1823, which was admitted.

By indenture under the hands and seals of the parties thereto, and duly stamped, dated 17th May, 1843, and made between William Collisson, an attorney and solicitor, of the one part, and the said Douglas Brown and the pauper of the other part, the pauper was articulated to the said William Collisson for the term of five years, and *743] *under these articles he served for two years, and during such period inhabited and dwelt for more than forty days in the parish of St. Mary, Newington, in the county of Surrey. (The indenture was here set out in the case. By it the pauper became bound to serve the said William Collisson as his clerk for the term of five years from the date of the deed, and Collisson, in consideration of a premium of 315*l.*, covenanted to teach and instruct the pauper in the profession of an attorney and solicitor.) These articles were duly registered.

By another indenture, dated 12th July, 1847, the said articles were assigned to William Robert Mingaye, an attorney and solicitor, for the then residue of the said term of five years; and the pauper served the said W. R. Mingaye as an articulated clerk, and for upwards of forty days, under such assignment, inhabited and dwelt in the said parish of St. Pancras, Middlesex. (This indenture was also set out. By it the pauper became bound to serve Mingaye as his articulated clerk for the ensuing two years and six months, being the residue of the original term of five years; and Mingaye covenanted to teach and instruct the pauper in his profession.) This assignment of the articles was duly registered.

On 8th May, 1849, by a rule of this Court, the pauper was discharged from further service, under the assignment, to the said W. R. Mingaye; and it was ordered that he should be at liberty to enter into further articles with, and serve under, one R. A. Goodman. The pauper did accordingly enter into such further articles by indenture, dated 9th July, 1849 (which was also set out in the case); whereby he bound himself to serve Goodman as his articulated clerk for the then residue of *744] the original term of five years, and Goodman covenanted to *teach and instruct him in the profession of an attorney and solicitor during such residue of the said term.

Under this last-mentioned deed, which was duly registered, the pauper served the said R. A. Goodman as an articled clerk, in his profession of an attorney and solicitor, for the term therein mentioned, and for forty days and upwards during that time did inhabit and dwell in the said parish of Clapham.

The question for the opinion of the Court was, Whether, by such residence and service as an articled clerk to an attorney and solicitor, the pauper gained a settlement in the said parish of Clapham. If the Court should be of opinion that he did thereby gain that settlement, the order of removal was to be quashed: but if the Court should be of the contrary opinion, the order was to be confirmed.

Knapp, for the respondents.—The question is, whether the pauper can be deemed to have been bound an apprentice by indenture, within the meaning of stat. 3 & 4 W. & M. c. 11, s. 8, which enacts, that “if any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement.” At the time that that statute passed, an apprentice was generally understood to be a person who went to a master to learn some trade. Stat. 5 Eliz. c. 4, enumerates the different classes of persons who may take apprentices. For instance, husbandmen, by sect. 25; householders in towns corporate, “using and exercising any art, mystery, or manual occupation there,” by sect. 26; merchants and other traders, by sect. 27; different artificers, by sect. 30. It is obvious that an attorney does not fall within any of *these classes. [*745 Subsequent statutes relating to apprentices have proceeded on the same assumption that they are persons put to learn a trade. Thus, stat. 31 G. 2, c. 11, which was passed to extend the benefit of stat. 3 & 4 W. & M. c. 11, s. 8, to apprentices bound by any deed, writing, or contract, not indented, recites in the preamble that many apprentices, owing to their not having been bound by indenture, “have been removed to the parish or place where their last legal settlement was before” their “apprenticeship, where they have had no encouragement to exercise their trades, or opportunity to gain a livelihood by their said trades to which they were so bound apprentices.” [CROMPTON, J.—I do not see why a person bound to learn the art of an attorney should not be considered an apprentice. *Rex v. St. Petrox*, Burr. S. C. 248, and *Rex v. St. Margaret’s in Lincoln*, Burr. S. C. 728, are instances of apprenticeships to learn housewifery business, which can hardly be considered a trade.] In *Ex parte Prideaux*, 3 Myl. & Cr. 327, Lord Chancellor Cottenham held that the articled clerk of an attorney was not, upon the bankruptcy of his master, discharged from his indentures, as being an apprentice to the bankrupt, within the meaning of The Bankrupt Act then in force, 6 G. 4, c. 16, s. 49. His Lordship says (3 Myl. & Cr. 332), “In one sense, undoubtedly, it may be said that a clerk is an apprentice to the attorney with whom he is placed; he is placed with him partly for the purpose of qualifying him to be admitted as an attorney under the Act of Parliament, and partly to learn the business of an attorney; and in that sense he may be said to be an apprentice. The meaning of the term apprenticeship, abstractedly from *the meaning which it has in practice received, [*746 is a service, the consideration for which is, in fact, the being taught the business of the party with whom the apprentice is placed.

But, in the construing of this Act of Parliament, as in the construction of other Acts, the question is not, whether, in the abstract, and according to the original derivation of the word, it may not be susceptible of some other meaning, but what is the ordinary acceptation of the term, and whether the Legislature has put any definite meaning upon it; because, if that is the case,—if the Legislature has in this Act used the word in its ordinary sense, or above all in the sense in which it had been used in previous Acts of Parliament, that sense must prevail.” He then observes that the word is to be found in stat. 5 Eliz. c. 4, and, after going through the sections of that Act which have been referred to, proceeds: “The only two descriptions of apprentices contemplated by that Act, are apprentices to husbandry, and apprentices to certain trades which were subject to the operation of the bankrupt laws.” He then, after referring to the statutes relating to attorneys, observes: “The statutes invariably keep the two things totally distinct: clerks are never called apprentices.” The whole of his reasoning, though founded on the policy of The Bankruptcy Act, is equally in point to show that an articulated clerk to an attorney is not an apprentice for settlement purposes. Wherever the Legislature has passed statutes affecting articulated clerks it has always referred to them by that name and not by the name of apprentices. Again, in *Ex parte Gill*, 7 East 376, it was held that *747] this Court has no power to discharge an *apprentice from his indentures; but the Court can, and frequently does, discharge an articulated clerk from his articles. In *Rex v. St. Petrox*, Burr. S. C. 248, the question whether the master exercised a trade to which the apprentice could properly be bound was not raised. The decision turned upon the effect of an absolute binding of a female apprentice for a fixed number of years, instead of for that number of years or till her marriage. So, in *Rex v. St. Margaret's in Lincoln*, Burr. S. C. 728, no objection was taken to the validity of the indenture of apprenticeship, but it was sought to show that there had been fraud in the assignment of the apprentice. That by the word apprentice is to be understood a person being taught some trade is shown further by the definitions of the word in dictionaries. Thus, Tomlins, in his Law Dictionary, defines an apprentice to be “A young person bound by indentures to a tradesman or artificer, who, upon certain covenants, is to teach him his mystery or trade;” and Johnson's definition is, “One that is bound by covenant to serve another man of trade, for a certain term of years, upon condition that the artificer, or tradesman, shall, in the mean time, endeavour to instruct him in his art or mystery.” In the case of an attorney's articulated clerk, the main object intended to be secured by the articles is that the clerk shall serve the attorney; the service is not made conditional on the attorney teaching him the profession, but the teaching is to be conditional upon the service.

Le Breton, contra.—In Blackstone's Commentaries, vol. 1, p. 426, *748] apprentices are thus described: “Another species of servants are called apprentices (from *apprendre*, to learn), and are usually bound for a term of years, by deed indented, or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art

and mystery;" "but it may be done to husbandmen, nay to gentlemen, and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting; who are also compellable to take them; and it is held that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion." *Ex parte Prankherd*, 3 B. & Ald. 257 (E. C. L. R. vol. 5), is a direct authority that an attorney's clerk is an apprentice. In *Vin. Abr. tit. Apprentice* (K.) 22, an instance is given of a person who was bound apprentice to a gentleman, who made use of him as his huntsman; in which service it was held that he gained a settlement. It was objected that he served a gentleman, and consequently no trade; but the Court held that it was sufficient, for the purpose of the settlement, that he was bound out as an apprentice, and the master might make use of him in what manner he pleased. *Rex v. Laindon*, 8 T. R. 379, shows that a contract may be a contract of apprenticeship, if the intention of the parties that it should be so can be collected from it, although the term "apprentice" is not used in it. Lord Kenyon, C. J., in giving judgment, says (8 T. R. 383), "When it is urged that the 'relation' of master and apprentice 'can only be formed by using the term 'apprentice,' it may be observed that the argument would lead to an absurd consequence; for then if the word 'clerk' were used in regular indentures of apprenticeship, the clerk [*749 could not gain a settlement by serving under the indenture, merely because he was not retained eo nomine 'as an apprentice;' but it would be a disgrace to our laws if we were obliged to decide according to words without considering their meaning." It is clear, from *Rex v. St. Petrox*, Burr. S. C. 248, and *Rex v. St. Margaret's in Lincoln*, Burr. S. C. 728, that it is not essential to the creation of an apprenticeship that the master of the person bound to serve should be in trade. The decision in *Ex parte Prideaux*, 3 Myl. & Cr. 327, if it be good law, is not to be extended beyond cases falling under the Bankruptcy Acts, which were passed alio intuitu from the statutes relating to the relief of the poor. Moreover, none of the cases as to settlement by apprenticeship were cited to the Lord Chancellor on the argument of that case. *Cuff v. Brown*, 5 Price 297, is an instance of an apprenticeship to a conveyancer; and there is no distinction in principle between the case of a conveyancer and that of an attorney. (He was then stopped.)

COCKBURN, C. J.—I am of opinion that the pauper gained a settlement by apprenticeship, under stat. 3 & 4 W. & M. c. 11, s. 8. Two points have to be considered: First, whether the binding of the pauper was such as would bring his service within the legal acceptance of the term apprenticeship; and, secondly, whether there was a sufficient binding and inhabitation to make the apprenticeship such as to satisfy the requirements of the statute. As to the first point, in legal acceptance, an apprentice seems to be a person who is bound [*750 to and who serves another, for the purpose of learning something which the other is to teach him. The articulated clerk of an attorney, though more familiarly known by the name of a clerk than by that of an apprentice, comes within this definition; for the clerk becomes bound in order to learn his master's profession, and it is the

duty of the master, in consideration of his service, to teach it him. As to the second point, stat. 3 & 4 W. & M. c. 11, s. 8. enacts, in the most general terms, that "If any person shall be bound an apprentice by indenture, and inhabit in any town or parish, such binding and inhabitation shall be adjudged a good settlement, though no such notice in writing be delivered and published as aforesaid." Now suppose that, immediately after the passing of this Act, a person had come to settle in a parish for the purpose of serving, and had served there, under such a binding as the present, would he have been removable or would he have gained a settlement in that parish? To ascertain this we must look to the intention of the Act. Before the Act, forty days' inhabitancy in a parish was sufficient to constitute a settlement; but the Act, by sect. 3, provides that the forty days shall not begin to run until a certain written notice is given by the person coming to inhabit to the parish officers, and is published by them. Then sect. 8 exempts persons bound apprentices by indenture and inhabiting in the parish, from the obligation to give the notice. The object, therefore, appears to have been to protect parishes from the liability to maintain persons coming to settle in them clandestinely and surreptitiously; but there would be nothing clandestine or surreptitious in a clerk coming into a parish for the purpose of serving under articles. It is true that an attorney is not mentioned in stat. 5 Eliz. c. 4, amongst the persons who may take apprentices; but if, by reason of stat. 3 & 4 W. & M. c. 11, s. 8, apprentices to any of the inferior tradesmen and handicraftsmen enumerated in stat. 5 Eliz. c. 4, s. 30, can gain a settlement, on the ground that their service, as such apprentices, in a parish, must be sufficiently notorious to raise the presumption that it is known to the parish, then, *a fortiori*, must service as an articulated clerk give rise to the same presumption, and have the same effect. It is said that the statute of Elizabeth, by not mentioning attorneys, impliedly precludes them from taking apprentices. But I think that it was not the object of that statute to do more than to legislate for the particular classes of trades to which it expressly refers; and that there may be valid apprenticeships, independently of the statute, to classes of masters not enumerated in it. Next it is said that the Legislature, when dealing with articulated clerks, always calls them clerks and never apprentices. An apprentice is, however, not the less an apprentice because he is called by some other name. Inasmuch as the term "apprentice" is generally applied to persons bound to learn a trade, I can quite understand that gentlemen practising a liberal profession might wish for a somewhat higher appellation. But, if an articulated clerk comes within the legal acceptance of "apprentice" in the statute of William and Mary, I cannot see that he is not within the benefit of that statute because the Legislature has elsewhere called him a clerk. It is urged that

*751] Lord Cottenham, when Chancellor, decided that an attorney's articulated clerk is not an apprentice.^(a) I do not desire to impugn that decision; nor is it necessary to do so. It may be that, having regard to the bankruptcy laws, Lord Cottenham came to a right conclusion: but we have to consider whether the very general terms of stat. 3 & 4 W. & M. c. 11, s. 8, are not wide enough to include

(a) *Ex parte Prideaux*, 3 Myl. & Cr. 327.

the case of an attorney's clerk, bound by indenture, and inhabiting in a parish. In my opinion we should be going a great deal too far were we to hold that this case did not fall within that statute.

CROMPTON, J.—I am entirely of the same opinion. We should not be justified in introducing an exception into the very general provisions of stat. 3 & 4 W. & M. c. 11, s. 8. (His Lordship read the section.) The meaning, in law, of the word "apprentice" is well known. He is a person bound to serve a master who is bound to teach him. Such was the meaning of the term, when the statute passed, no less than it is at present. We are told, however, that stat. 5 Eliz. c. 4, contains an exhaustive enumeration of the persons who may take apprentices, and that, inasmuch as attorneys are not among the number, their clerks cannot be considered as apprentices within the meaning of the later statute of 3 & 4 W. & M. c. 11. But I do not think that the general words of that statute are to be construed as referring only to such apprentices as are regulated by the statute of Elizabeth. Had the Legislature intended so to restrict them, it would have been easy to introduce an express reference to the statute of Elizabeth; and it is for the Legislature, *not for us, to do this. [*753 The only difficulty is occasioned by the decision of Lord Cottenham in *Ex parte Prideaux*, 3 Myl. & Cr. 327; but it must be borne in mind that that was a decision under the bankruptcy law. If the present case had arisen under that law, the decision would bind us; as it is, we are not called upon to give any opinion upon it either way. The Lord Chancellor, I observe, grounds his reasoning very much on the fact that an attorney does not become bankrupt as an attorney, but only in respect of other transactions in which he may be occasionally engaged.^(a) Such reasoning is clearly not applicable to settlement cases. However legitimate the Lord Chancellor's arguments may have been (and I do not say that they were not) with reference to stat. 6 G. 4, c. 16, they have no bearing upon the construction of stat. 3 & 4 W. & M. c. 11. Very possibly the appellation of clerks was bestowed upon persons bound to attorneys, at a later period than the time of William and Mary, and for the reason which the Lord Chief Justice has suggested. I can see no reasonable ground for thinking that the Legislature, in stat. 3 & 4 W. & M. c. 11, intended to make any distinction between articted clerks and other apprentices.

(HILL, J., was absent.)

BLACKBURN, J.—I am of the same opinion. The question turns upon the words of stat. 3 & 4 W. & M. c. 11, s. 8. (His Lordship read the section.) Now, in the present case, the pauper was bound apprentice, by *indenture, to an attorney, for the purpose of learning his art, trade, or mystery; and I have always thought that by "ap- [*754 prentice" is meant one who gives his services in order to be taught. I cannot see any reason for restricting apprenticeships to cases where the master exercises a manual occupation or is engaged in commerce. The only question is whether we are not bound, out of respect for Lord Cottenham, to follow his decision in *Ex parte Prideaux*, 3 Myl. & Cr. 327. Nothing, however, that we now say contradicts his judgment. Whether he took a right or wrong view of *The Bankrupt*

(a) See 3 Myl. & Cr. p. 337.

Act, 6 G. 4, c. 16, we need not say. If the term "apprentice," when stat. 3 & 4 W. & M. c. 11 passed, included the case of a person bound by indenture to learn any craft, art, trade, or mystery of another, as it clearly did, some one or other of those words must be applicable to the business of an attorney.

Order of removal quashed.

*755] *The Guardians of the Poor of the PORTSEA ISLAND UNION, in the County of SOUTHAMPTON, v. THOMAS JOHN WHILLIER. April 27.

By an order of the Poor Law Commissioners plaintiffs, guardians of a Union, were directed to appoint collectors of the poor-rates of such of the several parishes in the Union as plaintiffs might deem to require a collector; and every person appointed a collector was required to give security for the due performance of the duties of his office. In the interval between this order and the passing of stat. 13 & 14 Vict. c. 99, which regulates the collection of poor-rates assessed upon the owners of small tenements in parishes, plaintiffs, in pursuance of the order, appointed several persons as collectors of the poor-rates of P., one of the parishes in the Union. Subsequently to that Act, and to its adoption by the parish of P., plaintiffs determined to appoint an additional collector; and, one of those originally appointed having resigned, advertised that they were about to appoint "two persons to be collectors of the poor-rates of the parish of P., to one of whom" would "be assigned a collection of such rates from the owners of small tenements." W., in answer to the advertisement, sent in the following written application: "There being two collectors of poor-rates about to be appointed for the parish of P., may I" "offer myself as a candidate for one of them?" Plaintiffs afterwards elected W. and another person, by a resolution which declared that the latter was elected in the place of the retiring collector, and W. for the purpose of collecting the rates from the owners of small tenements. Both appointments were approved of by the Poor Law Board. Defendant then executed a bond as surety for W., which, after reciting the order of the Poor Law Commissioners, and that W. had been "duly appointed to be a collector under the said order," was conditioned for the faithful discharge by W. of his duties "during his continuance in the said office of collector." W. entered on his duties, and for some years collected the poor-rates assessed upon the owners of small tenements in P. One of the previously appointed collectors, who collected all the poor-rates in L., a district of P., then resigned, and plaintiffs, on W.'s application, transferred him to that district. No new bond was then executed. W. afterwards committed defalcations, in respect of which plaintiffs now sued defendant, as surety, upon the bond executed by him.

Held, that defendant was liable; for that W. was appointed, in the first instance, as collector of the poor-rates of P. generally, not of the poor-rates payable by the owners of small tenements in P. exclusively; so that his transfer to the L. district was not an appointment of him to a fresh office, or such an alteration in his duties as to discharge his surety from further liability.

SPECIAL case stated by consent, under an order of Crompton, J.

Declaration on a bond given by defendant, one James William Whillier and one William Hatch, by which they jointly and severally acknowledged themselves to be bound to plaintiffs in the sum of 400*l.*, to be paid to plaintiffs; the condition of which bond was to the tenor *756] following: "Whereas, by an order under the seal of the *Poor Law Commissioners, bearing date 9th August, 1836, it was ordered and directed that the said guardians" (plaintiffs) "should appoint one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the several parishes comprised in the Portsea Island Union, as the said guardians might deem to require a collector in the said Union; and that the officer so appointed should discharge the several duties therein specified. And it was thereby further ordered and directed, that every person to be appointed a collector under that order should, before he entered on the performance of the

duties of his office, give such security for the due and proper discharge of the same as should appear to the said guardians to be necessary and fitting; and whereas, at a meeting of the said guardians held on 2d June, 1852, the above-named James William Whillier was duly appointed to be a collector, under the said order, and he was required by the said guardians to enter into a bond, with two sufficient sureties, for the due discharge of the duties of his office and the trusts to be reposed in him; And whereas he has requested the said Thomas John Whillier" (defendant) "and William Hatch to join with him as his sureties in the above-written bond, subject to the condition thereunder written, to which they have assented; and the said guardians have agreed to accept of them as such sureties accordingly; Now the condition of the above-written obligation is, that if the above-named collector shall at all times during his continuance in the said office of collector, and whether the district, parish, and places for which he is appointed to act as such collector be or be not hereafter changed, or diminished, or enlarged, or in anywise altered, duly, attentively, and faithfully discharge the *duties thereof by punctually entering [*757 or filling up, and accurately keeping and making such books, forms, accounts, and returns, as are or shall be lawfully required to be kept or made by collectors of poor-rates, by diligently collecting and demanding the aforesaid rates and payments of the persons charged therewith, and, in default of payment, recovering the same from such persons by due course of law, so that no avoidable loss may be sustained by the said parish, by regularly paying over the moneys so collected by him to the overseers, or other parties entitled to receive the same, and satisfactorily exonerating and discharging himself from the uncollected rates and payments intrusted to him for collection, by regularly and correctly rendering, producing, balancing, and verifying his books, accounts, and vouchers in and concerning such collection, and by giving all proper attendance on the Board of Guardians, auditor, and magistrate in the business of such collection, by obeying the lawful directions of the said guardians, and in the above and all other respects and particulars well and truly observing, fulfilling, and keeping all the rules, orders, and regulations of the Poor Law Commissioners in force for the time being, so far as the same may extend or apply to the said office, or the duties thereof, according to the purport, true intent and meaning of the same; and shall faithfully discharge all the duties which shall be reposed in him in virtue or by reason of his said office; and if, on resigning or being removed from the said office, or at any time when thereto required by the said guardians or Poor Law Commissioners, by notice to him given or left at his usual or last known place of abode during his continuance in the said office, he shall account for, hand over, and pay over to the said *guardians, or to such persons as they may appoint, or to the [*758 overseers or other parties entitled to receive the same, all such books and papers, balances, moneys matters, and things, being the property of the said parish, or of the said guardians in respect of such parish, or of the respective churchwardens and overseers, or other officers of such parish, which shall be in his custody, possession, or power, in virtue of his said office, or otherwise howsoever, without loss, abatement, misapplication, fraud, deceit, or concealment; And if (in the

event of the said collector being desirous of resigning the said office) he shall give to the said guardians one calendar month's notice of his intention so to do, or forfeit one month's amount of salary, to be deducted as liquidated damages from the amount of salary due at the time of such resignation, unless the said guardians shall be willing to accept a shorter notice, or an immediate resignation; And if (in the event of the death, incapacity, bankruptcy, or insolvency of the said collector, during his continuance in the said office) his executors, or administrators, or assignees, as the case may be, or his above-named co-obligors, or any of them, shall, on a day to be fixed for that purpose by the said guardians, and of which notice shall be left at the usual or last-known place of abode of the said collector, account for, hand over, and pay over to the said guardians, or to the overseers or other parties entitled to receive the same, such books and papers, balances, moneys, matters, and things as aforesaid: then the above-written obligation shall be void.

Averment, that the said James William Whillier did not, nor would, after the making of the said bond, at all times during his continuance in the said office of collector, within the true intent and meaning of the said condition, duly, attentively, and faithfully discharge *759] the *duties thereof, by punctually entering or filling up, and accurately keeping and making such books, accounts, and returns, as were lawfully required to be kept and made by collectors of poor-rates, nor did, nor would he, duly, attentively, and faithfully discharge the duties of the said office, by regularly paying over to the overseers, or other parties entitled to receive the same, divers moneys, amounting, to wit, to 600*l.*, collected by him as collector of the said poor-rates, for and in respect of such rates; whereby the said bond became forfeited. That the said James William Whillier, after the making of the said bond, resigned and was removed from the said office; Yet he did not, nor would, on such resignation, or removal, or at any time afterwards, although a reasonable time for his so doing had elapsed, account for, hand over, and pay over to the said guardians, or to the overseers, or other parties entitled to receive the same, divers balances and moneys, amounting, to wit to 600*l.*, being the property of the parish of Portsea, being one of the several parishes comprised in the said Portsea Island Union, and for which he was appointed and was collector as aforesaid, or of the churchwardens and overseers, or other officers of the said parish, which were in his custody, possession, or power, by virtue of his said office and otherwise, without loss, abatement, misapplication, fraud, deceit, or concealment, or otherwise. That defendant, and the said other makers of the bond, had not, nor had either of them, paid the sum of 400*l.*, or any part thereof, and that the same remained wholly due and unpaid.

The pleas material to the present case were the second and fourth. *760] 2d plea. That the said James William Whillier did *at all times during his continuance in the office of collector to which he was appointed as in the recital to the condition of the bond was mentioned, within the true intent and meaning of the said condition, duly, attentively, and faithfully discharge the duties thereof by punctually entering and filling up, and accurately keeping and making such books, accounts, and returns, as were lawfully required to be kept

and made by collectors of poor-rates, and did duly, attentively, and faithfully discharge the duties of the said office by regularly paying over to the overseers, or other parties entitled to receive the same, the moneys collected by him as such collector as aforesaid.

4th plea. That the parish of Portsea was not the parish for which the said James William Whillier was appointed as collector as aforesaid, within the meaning of the condition to the said bond as alleged.

Issues were joined on these pleas; and a verdict, subject to the opinion of the Court on this case, was afterwards taken, by consent, for the plaintiffs.

The facts for consideration were as follows.

By an order of the Poor Law Commissioners, of 24th June, 1836, it was directed that, on 18th July then next, the parishes of Portsea and Portsmouth should be and should thenceforth remain united, for the administration of the laws for the relief of the poor, by the name of the Portsea Island Union. By a further order, of 9th August, 1836, the Commissioners directed the appointment of collectors for the several parishes in the said Union. This order (set out in the case) purported to be made under the powers vested in the Commissioners under The Poor Law Amendment Act, 4 & 5 W. 4, c. 76, and directed the guardians of the *Portsea Island Union to appoint [*761 one or more fit and proper persons to be the collector or collectors of the poor-rates of such of the several parishes comprised therein as the said guardians might deem to require a collector. The order provided that, in case and so often as any person so appointed should die or resign, or be removed, the Board of Guardians should, as soon after as conveniently might be, proceed in like manner to a new appointment. It then, amongst other things not now material, prescribed the remuneration to be received and the duties to be performed by the collectors; and required that every person appointed to be a collector should, before entering on the performance of his duties, give security for the due and proper discharge of the same. Under this said order the guardians of the said Union elected in the first instance three persons to be the collectors of the poor-rates in the parish of Portsea; to each of whom, on account of the extent of the parish, was assigned a certain portion of the parish, within which they were to collect the rates. The duties of collectors are defined in the several orders of the Poor Law Board of 17th March, 1847, 18th November, 1850, and 16th March, 1859. Subsequently, in the year 1848, on account of the great increase of buildings in Portsea, two of the then-existing collectors declared their inability to do all the duties of collection; and the guardians then divided the parish into four districts for collection, and, with the approval of the Poor Law Board, appointed an additional collector. Afterwards, the parish of Portsea having resolved to adopt stat. 13 & 14 Vict. c. 99, entitled "An Act for the better assessing and collecting poor-rates and highway-rates in respect of small tenements," it was determined to *appoint a fifth col- [*762 lector of poor-rates. At this time Mr. Henry Hewitt, one of the four collectors already acting, resigned his office; and it was therefore determined by the Board of Guardians that the appointment to the place thus vacated, and the appointment of the additional collector, should take place at the same time. An advertisement was

accordingly published by the Board of Guardians, stating that they would, at their meeting to be held at the Union House, Portsea, on 2d June, 1852, appoint two persons to be the collectors of the poor-rates of the parish of Portsea, to one of whom will be assigned the collection of such rates from the owners of small tenements under the provisions of" stat. 13 & 14 Vict. c. 99. That the allowance to each collector, would be 4*d.* in the pound on the amount of his collection; and that a joint and several bond would be required from each successful candidate, with two sureties to be approved of by the Board, in a sum to be named at the time of the appointment.

In reply to this advertisement they received an application, by letter, from James William Whillier, in which he said "There being two collectors of poor-rates about to be appointed for the parish of Portsea, may I respectfully beg to offer myself as a candidate for one of them?"

The meeting was held by the Board of Guardians, and from the minutes of its proceedings it appeared that S. Haslett and J. W. Whillier were then elected collectors of the poor-rates in the parish of Portsea; the former in the room of Mr. Hewitt resigned, and the latter for the purpose of collecting the rates from the owners of small tenements. The Poor Law Board confirmed the appointments, and *763] the said J. W. Whillier thereupon entered upon his duties, and collected the rates that were assessed upon the owners of small tenements in the parish of Portsea, up to June, 1855. The bond mentioned in the declaration was executed by him, and by defendant and Mr. Hatch, as his sureties, on 16th December, 1852. On 27th June, 1855, Mr. James King, one of the previously appointed collectors of poor-rates in the parish of Portsea, resigned his office as collector for the Landport District; whereupon J. W. Whillier applied to the guardians to be removed to that district, and, by a resolution of the Board at their next meeting, his application was accepted. From that time, down to November, 1858, he ceased to collect the rates for the parish of Portsea assessed on the owners of small tenements, and collected the rates for the said parish, assessed on the occupiers in the district vacated by Mr. King. His remuneration was 4*d.* in the pound on the amount of rates collected by him, during the whole of the period from 1852 to 1858. No new bond was given by him in 1855. In 1858 he was discovered to have committed defalcations to a great amount. The question for the opinion of the Court was, Whether the defendant was liable upon the bond, as one of the sureties of the said J. W. Whillier, to make good the defalcations.

Lush, for the plaintiffs.—The defence set up to this action is that, since the execution by the defendant of the bond sued upon, the duties of his principal, the defaulting collector, were altered to such an extent as to relieve the defendant from liability. The facts of the case, however, show, as the bond also recites, that the appointment of J. W. *764] Whillier, the collector in question, was, like that of all the other collectors, a general appointment to be a collector, under the order of the Poor Law Commissioners. All the collectors were appointed, in the first instance, for the general purpose of collecting the poor-rates in the parish of Portsea; and the duties of the collec-

tion were afterwards distributed between them at the pleasure of the guardians, who assigned to each of them a particular district. The bond does not mention any specific duties of collection, in respect of the due performance of which by the principal the sureties were to be liable. By it, they guaranteed the faithful discharge by him of his duties, so long as he continued to be a collector, "whether the district, parish, and places for which he" was "appointed to act as such collector" were or were not thereafter "changed, or diminished, or enlarged, or in anywise altered." That the appointment of Whillier was a general one, as a collector for the whole parish of Portsea, appears from the terms of the plaintiff's advertisement for candidates, of Whillier's letter of application, and of the minutes of the election. From the time of his appointment, down to that when his defalcations were discovered, he continued to be and to act as such a collector, although employed at one time in one district of the parish, at another in another. His position may be illustrated by that of a clerk in a bank; who, though at one time employed at the ledger, and at another as cashier, continues at all times to be a clerk. Having complied with the order of the Poor Law Commissioners by making a general appointment, the guardians were at liberty to apportion the duties of collection between the collectors as they thought fit; and the transfer of Whillier to the Landport District, in 1855, *was [*765 not in excess of their powers, or in any way a fresh appointment of him as collector. The language of Parke, B., in *Stewart v. McKean*, 10 Exch. 675, 689, 690,† is strongly in point, having regard to the wording of the bond in the present case, to show that the defendant is liable to the fullest extent. He there says, "The defendant" (the surety) "did not know that any particular mode of dealing with the plaintiffs" "had been agreed upon between the plaintiffs and the agent" (the defendant's principal), "or was then used, or intended to be used, between them. What, then, is the construction of the guarantee?" "It clearly leaves the mode of accounting open, and the will of the employer alone is to regulate that, within the bounds of reason; or as the" employer "and agent may agree." "Had it been material in the mind of the defendant to be liable only for the then mode, or any fixed mode of dealing or accounting as agent, it should have been so stipulated in the written contract." "The defendant was never informed of the existing mode, and never inquired about it." [CROMPTON, J., referred to *Pybus v. Gibb*, 6 E. & B. 902 (E. C. L. R. vol. 88).]

Joyce, contra.—The defendant is not liable. The question is whether or not, after the execution of the bond, there was a change in the duties of J. W. Whillier for his due performance of which the bond was given. His transfer, in 1855, from the post of collector of rates from the owners of small tenements to that of collector of the rates for the whole of the Landport District, constituted such a change. It was for his fidelity in the first post, alone, that the defendant became surety. And the original appointment was to that post alone; not, *as is said by the other side, to the general [*766 post of collector for the whole parish. The appointment of Whillier, in 1855, to the Landport collectorship, was an entirely new one; and one with respect to which the defendant never agreed to

become, and cannot be held, responsible. In making the first, the special appointment, the guardians in no way exceeded the powers conferred on them by the order of 9th August, 1836, which contains nothing to show that the appointment of a collector to collect a particular class of rates, or rates for a particular district, would be bad. Moreover, that order was made before the passing of stat. 13 & 14 Vict. c. 99. The collectorship of the Landport District must have involved responsibilities in the collector greater than those incident to the collection of the rates from the owners of small tenements: and the defendant, at the time he gave the bond, cannot have contemplated this increase in the responsibility of his principal. The present is a much stronger case in favour of the defendant than *North Western Railway Company v. Whinray*, 10 Exch. 77,† in which a change in the mode of remunerating the principal, subsequent to the execution of the bond of suretyship, was held to put an end to the liability of the surety. When a surety's engagement relates to the discharge by the principal of the duties of a particular office, it extends only to the performance of such duties as were included in the office when the engagement was entered into: *Bartlett v. Attorney-General*, Parker 277; where a person who became surety for a collector of the customs revenue, upon his appointment in 1691, was held not liable in respect of a deficiency in the customs duty on *767] coals collected by him, which duty was first imposed in 1698. [BLACKBURN, J.—In that case, and in *Pybus v. Gibb*, 6 E. & B. 902 (E. C. L. R. vol. 88), the duties and liabilities of the principal, and consequently the risk of the surety, were materially increased.]

Lush, in reply.—The only question here, as in *Frank v. Edwards*, 8 Exch. 214,† is, whether there was any revocation of the original appointment of the principal. It is clear that there was not. By the express words of the bond the defendant would have continued liable, though the parish for which the principal was appointed had been changed, diminished, or enlarged, while the latter continued collector. A fortiori is he liable now; for the parish remains the same, and nothing has happened but the shifting of the principal to a different district in it.

COCKBURN, C. J.—The first question which has to be determined is, whether the appointment of the collector for whose default the plaintiffs seek to make the defendant responsible as surety, was an appointment as collector of the poor-rates of the parish generally, or as collector of the poor-rates payable in respect of small tenements in the parish, exclusively. If it was the latter, then, inasmuch as, by the subsequent act of the guardians, the collector was employed for an entirely different purpose, and made default while in that substituted employment, the authorities show that the defendant, as surety, is not responsible for such default in his principal. Although, however, the matter is not free from doubt, I think, upon the whole, that *768] the right conclusion is that the collector was appointed to collect the poor-rates of the parish of Portsea generally. The order of the Poor Law Board was for the appointment of collectors for parishes generally: and the advertisement, which led to the application by Whillier for the appointment, announced that the guardians were about to appoint two persons to be collectors of the poor-rates

of the parish of Portsea, with the additional intimation that to one of them would be assigned the collection of such rates from the owners of small tenements. Whillier having been appointed a collector, next comes the bond, in which he is treated as a collector of the poor-rates generally. Looking at the whole of the circumstances, the order of the Poor Law Board, the advertisement, the answer to it, and the bond, I think there is sufficient evidence to justify us in holding that the appointment was general, and not for the specific and more limited purpose. It is true that the appointment itself is couched in language apparently pointing to the more specific duty as that to the discharge of which Whillier was appointed; but, looking at the whole matter, we must not give too much weight to that: it may well be that the guardians came to the resolution to make the general appointment of Whillier as a collector, though they at the same time determined what duties they would assign to him after his appointment. In the event of the illness or death of one of the collectors, could it have been said that each of them was so exclusively appointed for a particular district or a particular purpose, that the other could not have been transferred to the district or duties vacated, and his place filled up by a collector then newly appointed? I think, therefore, that the appointment was general, and that the distribution *of duties between the persons appointed was [*769 matter for subsequent arrangement by the guardians. This conclusion appears to me to be consonant with the justice of the case; for it would be hard if the surety could evade liability on the ground suggested.

CROMPTON, J.—I have felt during the argument, and even now feel, considerable doubt; but on the whole, I agree with the rest of the Court, on the ground that it is not made out that the appointment of Whillier the collector was a special one. It is more consistent with the terms of the order of the Poor Law Board, at all events, that we should hold the appointment to have been general. I felt much pressed by the language of the advertisement, which stated that specific duties would be assigned to one of the collectors; I think, however, upon the whole, that it is consistent even with this that the appointment was to be general. I attach much weight to the argument of the Lord Chief Justice, that, in the event of the death or illness of one of the collectors, the other might have been ordered to perform his duties, and the duties theretofore discharged by the remaining collector might have been assigned to a collector newly appointed to fill the vacancy. The bond, moreover, recites that Whillier was appointed to be a collector, under the order of the Poor Law Board. I therefore upon the whole, though not without doubt, give judgment in favour of the plaintiffs.

(HILL, J., was absent.)

BLACKBURN, J.—I also have entertained considerable doubt in this case: but, upon the whole, I am of opinion *that the plaintiff [*770 is entitled to judgment. The law on the subject is clearly laid down by Wightman, J., in *Pybus v. Gibb*, 6 E. & B. 902, 915 (E. C. L. R. vol. 88), as follows: "It may be taken as a principle of law that a bond by a surety, conditioned for the due performance by his principal of the duties of an office, is rendered null if the office or its

duties are so altered as in any degree to increase or vary the risk of the surety to his possible disadvantage." The question therefore is, what was the nature of the office to which the defendant's principal was appointed, and the due performance of the duties of which was guarantied by the defendant? Looking at the bond and its recitals, it appears that the principal was appointed, generally, as a collector of the poor-rates for the parish of Portsea. Several collectors were appointed, and it appears to me that it was competent to the guardians, by arrangement among themselves, to distribute the duties of the office between these different persons; and that the principal took office as a collector, and the defendant became responsible as his surety, with the understanding that there might from time to time be a re-arrangement of the duties to be performed by the different collectors.

Judgment for the plaintiffs.

*771] *The Overseers of the Township of EVERTON, in the County of LANCASTER, Appellants, v. The Church wardens and Overseers of the Parish of SOUTH STONEHAM, in the County of SOUTHAMPTON, Respondents. April 25, 28.*

Stat. 3 & 4 W. & M. c. 11, s. 6, enacts, "that if any person who shall come to inhabit in any town or parish" "shall be charged with and pay his share towards the public taxes or levies of the said town or parish," he shall gain a settlement there, though he has given no such written notice of his having come to inhabit there as the Act elsewhere requires.

A. rented and occupied a house in E., a township wholly within the borough of L., from September, 1857, to November, 1858. Only one poor-rate in each year was made by the overseers of E. In 1857, it was made in March for the ensuing year; and the then occupier of the house was assessed to it, and paid the whole amount assessed. In 1858, it was made in April for the year then ensuing, and A. was assessed to it in 1*l.* 4*s.*, of which sum (the whole of which was, in the first instance, demanded of him) he ultimately paid only 14*s.*, the calculated proportion for the period of his occupation subsequent to the making of the rate. The house remained unoccupied from the time A. quitted it until after the making of the next poor-rate. In April, 1858, the town council of L., under The Municipal Corporations Acts, 5 & 6 W. 4, c. 76, s. 92, and 7 W. 4 & 1 Vict. c. 81, s. 1, made a watch-rate for L. for the year ending 1st March, 1859, and ordered the overseers of E. to levy and collect the proportion thereof payable by the parts of E. liable thereto, by a pound-rate upon the owners of all rateable property within those parts, and to exempt from the rate such parts of E. as were more than two hundred yards distant from any street or continuous line of houses which were regularly watched within the borough under the provisions of The Municipal Corporations Acts. The overseers of E. levied and collected the rate in pursuance of the order. A. was one of the occupiers whom they assessed to it, and he paid the whole amount assessed.

Held, first, that A. did not gain a settlement in E., under stat. 3 & 4 W. & M. c. 11, s. 6, by his payment of the poor-rate, not having paid the whole of the amount of it with which he was charged. Secondly, that nevertheless he did gain that settlement by his payment of the watch-rate; for that the statute is satisfied by the payment, by an inhabitant of a parish, of his share towards any one distinct public tax or levy of the parish with which he is charged, as such inhabitant, by the parish officers, and that (Crompton, J., dubitante as to this) the watch-rate was such a public tax or levy of E., though parts of E. might be exempt from it.

CASE stated, under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of the Court, as to the settlement of Matilda Wadham, wife of Benjamin Braffitt Wadham; and to dispose of an appeal to the Quarter Sessions for the county of Southampton, pending between the parties, against an order of removal of the said Matilda Wadham from South Stoneham to Everton.

*772] *The pauper's husband, B. B. Wadham, bonâ fide rented a tenement, consisting of a separate and distinct dwelling-house,*

situate in Clarence Grove, in the township of Everton, being a township maintaining its own poor, bonâ fide hired by him, at and for the sum of 16*l.* a year, for the term of one whole year; which house was held and actually occupied under such yearly hiring, and the rent for the same, to the amount of 16*l.*, actually paid for the term of one whole year at the least by the said B. B. Wadham. Such renting and occupation commenced on 28th September, 1857, and continued until November, 1858.

The overseers of the said township are in the habit of making only one poor-rate in each year; and they had, before the commencement of the above-mentioned renting and occupation, that is to say, on 28th March, 1857, at which time the house in question was in the occupation of Edward Hughes, made a rate for the relief of the poor, in which the said Edward Hughes was rated; and he, on 7th July, 1857, paid the entire amount of the rate, 1*l.* 2*s.* 6*d.* On 10th April, 1858, the overseers made a poor-rate, in which the said B. B. Wadham was charged with and assessed to the same, in respect of the said house, in the sum of 1*l.* 4*s.*, which sum was duly demanded from him, but of which rate he paid 14*s.* only, being the proportion for the period during which he was in occupation subsequently to the making of such rate, and being the whole amount which, at the time of such payment, was demanded of him by or on the behalf of the overseers. When B. B. Wadham left this house, it remained empty until after the making of the poor-rate made next after he so left, so that there was no tenant from whom the 10*s.*, being the balance of the rate of 10th April, 1858, *which remained unpaid, could be recovered [*773 under the provisions of stat. 17 G. 2, c. 38, s. 12.

The township of Everton is wholly situate within the borough of Liverpool, which also comprises the parish of Liverpool, the township of Kirkdale, and portions of the townships of Toxteth Park and West Derby.

On 7th April, 1858, the Town Council of Liverpool passed a resolution, under The Municipal Corporations Acts, 5 & 6 W. 4, c. 76, and 7 W. 4 & 1 Vict. c. 81, that a general watch-rate should be levied and raised within the borough, for the year ending on 31st March, 1859; and ordered that a watch-rate, sufficient to raise and for the purpose of raising the sum of 8524*l.* 5*s.* 3*d.*, should be levied accordingly; and that, forasmuch as, at the time of the passing of The Municipal Corporations Act, the townships of Everton and Kirkdale, and part of the township of West Derby, and part of the township or extraparochial place of Toxteth Park, which, at the time of passing the resolution, formed part of the borough, were not within the provisions of the Act authorizing the levy of such rate for watching conjointly with other purposes, and it appearing expedient to the council that the whole of the said townships of Everton and Kirkdale, and the said parts of West Derby and Toxteth Park, except such parts thereof respectively as were more than 200 yards distant from any street or continuous line of houses which were regularly watched, within the borough, under the provisions of the Acts for the regulation of Municipal Corporations, should be rated to the watch-rate in like manner as the parish of Liverpool, the whole of the said townships and parts of townships, except such parts thereof respectively.

*774] as were more than 200 yards distant *from any street or continuous line of houses which were regularly watched, within the borough, under the provisions of the said Acts, should be rated to the said watch-rate in like manner as the parish of Liverpool. And it was further ordered that the mayor should issue his precepts to the overseers of the parish of Liverpool, and of the said townships respectively, to make returns respectively, in writing, to a Committee of the Town Council, of the full and fair annual value of the several estates and rateable property respectively within the said parish and townships and parts of townships which were not more than 200 yards distant from any street or continuous line of houses which were regularly watched, within the said borough, under the provisions of the said Acts, charged and assessed to the poor-rate at the time of making the same respective return and returns, or liable so to be, or charged or assessed on any other rate or assessment, whether parochial or public, without regard to the actual sums assessed, except where such property was assessed to its full annual value.

On 5th May, 1858, the Town Council passed another resolution, reciting the former, and also, amongst other things, that the overseers of Everton had made the returns required; and ordering that the sum of 1023*l.* 15*s.* 1*d.* should be assessed on the property in Everton liable to the watch-rate, as and for the amount of that rate, to be levied in the parts of Everton liable thereto; and that the overseers of the township of Everton, being the persons who by law might make poor-rates for the said township, should make, levy, raise, and collect the said watch-rate (that was to say, the sum assessed as aforesaid on the said property in the township), in due form of law, by pound-rates or assessments upon and from the occupiers of all rateable property *775] within the parts only of the said *township liable to watch-rates; and that the mayor should issue his warrant to one Richard Houghton (who was thereby appointed to collect the watch-rate) ordering him to issue his warrant to the overseers of the township of Everton, to make, levy, and collect the said watch-rate within the time to be named or limited in the said warrant; and also requiring Houghton to demand and receive the rate from them, when collected, and to pay over the amount to the treasurer of the borough.

In pursuance of this resolution, the mayor and Houghton respectively issued the warrants referred to. The warrant issued by Houghton to the overseers of Everton was headed "Borough of Liverpool," and addressed "To the overseers of the poor of the township of Everton, being a township situate wholly within the said borough, and supporting and liable to support its own poor, and part only of which township is liable to watch-rate, and which said overseers are the persons who by law may make a poor-rate for the said township." It required them to levy, collect, and pay to Houghton, within thirty days of its date, the sum of 1023*l.* 15*s.* 1*d.*, "being the amount of the watch-rate made and imposed by the orders of council, for the year ending on 31st March, 1859, for which the said parts of the said township, so liable to watch-rate as aforesaid, are liable, and laid and assessed thereon by the said council, in due form of law, by a pound-rate or assessment upon and from the occupiers of all rateable

property within the part or parts only of the said township liable to watch-rate, that is to say, the said part of the said township within the said borough, except such parts thereof as are more than 200 yards distant from any street or continuous line of houses, which shall be regularly watched within the borough, under the *provisions of the Acts for the regulation of Municipal Corporations." [*776

After the passing of the above resolutions, and the making of the above warrants, the overseers of the township of Everton made and collected a pound-rate upon and from the occupiers and possessors of all property assessable to such rate within such township, for the amount of the watch-rate in such document referred to, and chargeable upon the said township. Such rate has no title other than the printed heading, "Watch Rate, 1858," at the top of each page. The declaration and allowance, at the foot of such rate, is as follows. "We, Thomas Bird, George McConnal, and Joseph Cafferata, the persons specially appointed to act and to execute and perform the duties of overseers within and of and for the township of Everton, situate wholly within the borough of Liverpool, for, in, and about the making, laying, and raising and collecting therein the watch-rate for the year ending on 31st March, 1859, do declare the several particulars specified in the respective columns of the foregoing rate, for the district No. 2, to be true and correct as far as we have been able to ascertain them, to the which end we have used our best endeavour.

"THOMAS BIRD,	} Overseers of the
"GEORGE MCCONNAL,	
"JOSEPH CAFFERATA,	
	township of
	Everton."

"We, Richard Shiel, and Samuel Holme, Esqres., two of Her Majesty's Justices of the Peace for the borough of Liverpool (one whereof is of the quorum), do consent unto and allow of this assessment.

"Witness our hands this 23d October, 1858.

"RICHARD SHIEL.
"SAMUEL HOLME."

The rate is made in three parts or districts, and the *foregoing declaration and allowance appear at the foot of the book of [*777 each part or district.

The overseers by whom the said watch-rate was made and levied, were the overseers of the poor of the township of Everton, appointed under stats. 43 Eliz. c. 2, s. 1, and 13 & 14 Car. 2, c. 12, s. 21, or one of them; and they, as such overseers, were the proper officers, under the statutes relating to the levying of watch-rates in boroughs, to make and levy the said watch-rate. The statement, contained in the declaration signed by the overseers at the foot of the said watch-rate, that they were overseers specially appointed for the purpose of making, levying, and collecting the said rate, was not the fact, but was an incorrect statement. B. B. Wadham is charged and assessed in such watch-rate with and in the sum of 5s. 4d., which sum he paid on 17th November, 1858. The overseers authorized and employed the collector of the poor-rates to collect the said watch-rate on their behalf, which he did. The said B. B. Wadham resided in the said township of Everton for forty days and upwards after he had paid the said proportionate part of the said poor-rate of 10th April, 1858, and the said watch-rate; but his tenancy

of the said house in Clarence Grove had expired, and he had ceased to be the occupier thereof, prior to the completion of such forty days' residence.

Upon the above grounds, or some of them, the pauper had been ordered to be removed from South Stoneham to Everton.

The question for the opinion of the Court was, Whether the said B. B. Wadham, the pauper's husband, under the facts before detailed, acquired a settlement in the township of Everton. If the pauper's husband did acquire such settlement, then the order was to be confirmed; if not, it was to be quashed.

*778] *Huddleston*, for the respondents.—The pauper's husband, B. B. Wadham, gained a settlement in Everton. That he did not do so by renting a tenement must be conceded; for he did not pay poor-rate in respect of the tenement for one year, and therefore failed to satisfy the requirements of stat. 4 & 5 W. 4, c. 76, s. 66. But, notwithstanding that Act, a settlement may still be acquired, under stat. 8 & 4 W. & M. c. 11, s. 6, by a person who comes to inhabit in any town or parish, and is "charged with and" pays "his share towards the public taxes or levies of the said town or parish," provided that he is so charged in respect of a tenement such, and rented and occupied in such manner, as is required by stat. 6 G. 4, c. 57, s. 2. That the tenement was of that description, and was so rented and occupied by Wadham, appears clearly from the case; and the simple question, therefore, is whether he was charged with and paid his share of the public taxes or levies of Everton, within the meaning of the statute of William and Mary: it being admitted that he resided there forty days after he had been charged with and paid the rates to which he was assessed, and, so, complied with the requirements of the statute as to inhabitancy. The facts stated in the case show that he was charged with and paid his share both of the poor-rate and of the watch-rate. First, as to the poor-rate. The only such rate to which Wadham was assessed was that of 10th April, 1858, and, although he was assessed to it in the sum of 1*l.* 4*s.*, the 14*s.*, part of that amount, which he paid, was the entire proportion for which he ever was liable, being the proportion for the period between April and November, 1858, when he ceased to occupy the house in Clarence Grove. No more than that proportion could be legally demanded of him, by reason of stat. 17 G. 2, *c. 38, s. 12, (a) although no fresh tenant succeeded him in the occupation of the house until after the next poor-rate had been made. [CROMPTON, J.—In order to gain the settlement, a person must be "charged with and pay his share" of the taxes or levies. Can it be said that Wadham paid what he was charged with?] He paid his share, and could not lawfully be charged with more. *Regina v. St. Marylebone*, 15 Q. B. 399 (E. C. L. R. vol. 69), decided upon the construction of the St. Marylebone local Act, a similar enactment to stat. 17 G. 2, c. 38, s. 12, shows that the settlement was gained. [CROMPTON, J.—In that case the pauper, an incoming tenant, was held to be charged with the rates by the express provi-

(a) Which enacts, "That where any person" "shall come into, or occupy any house," "out of or from which any other person assessed shall be removed," "every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to" the poor, "rate, in proportion to the time that such person occupied the same respectively."

tions of the local Act, which rendered such a tenant liable to the payment of the rates, in proportion to the time of his occupation, in like manner as if he had been originally rated. BLACKBURN, J.—And it clearly appeared that the pauper had paid the whole amount of rates that ever was due from him, and with which he was ever charged. Whereas, here, it appears that Wadham was originally charged with the whole of the rate; and, inasmuch as he was not succeeded by another tenant till after a fresh rate had been made, it is more than doubtful whether stat. 17 G. 2, c. 358, s. 12, exempted him from liability to a part of the rate.] In *Rex v. Bramley*, Burr. S. C. 75, it was held, that the being charged with and making two quarterly payments to the land-tax only, will gain a settlement; and Lord Hardwicke, C. J., *said, “The Act of 3 & 4 W. & M., c. 11, s. 6, does not require a [*780 payment for a *whole* year; the payment of his *share* is sufficient: though it be not for the whole year. It is all that the statute requires: which is ‘paying *his share towards the public taxes or levies of the parish.*’ He might not perhaps reside in the parish during any whole year; but in part only of two distinct years.” [COCKBURN, C. J.—We all think that, so far as the poor-rate is concerned, the facts show that the pauper’s husband did not gain a settlement; inasmuch as he did not pay the rate with which he was charged.] Then, secondly, he was at all events charged with and paid the watch-rate, and thereby gained a settlement, if that rate was a public tax or levy of the township of Everton. That it was so is evident from the provisions respecting it contained in The Municipal Corporations Acts. By the first of these, stat. 5 & 6 W. 4, c. 76, s. 92, the council of a borough is empowered to levy a watch-rate in the borough, and to order that any part of the borough not theretofore rated shall be rated thereto, “and such watch-rate thereupon shall be levied in the part mentioned in such order in like manner as in the other parts of the borough,” “and all such sums levied in pursuance of such watch-rate shall be paid over to the account of the borough fund: Provided always, that no such order as last aforesaid shall be made for rating to such watch-rate any part of any borough in which at the time of passing this Act such rate as aforesaid shall not be levied, and which is more than 200 yards distant from any street or continuous line of houses which shall be regularly watched within the borough under the provisions of this Act.” The order for the levy of the watch-rate in question was made strictly in accordance with this *enactment. By the subsequent [*781 Act, 7 W. 4 & 1 Vict. c. 81, s. 1, “in all cases where by” that Act, or by stat. 5 & 6 W. 4, c. 76, a “watch-rate may be made and levied in any borough, the council of such borough may order the churchwardens and overseers of every parish or place within which such rate may be levied, or such other persons as by law may make a poor-rate for any such parish or place within the limits of such borough, to pay the amount of such part and portion of such rate for which such parish or place respectively shall be liable out of the poor-rate made and collected or to be made or collected for such parish or place;” or, instead, the council may order the churchwardens and overseers, or other persons, “to make and collect a certain pound-rate upon and from the occupiers or possessors of all rateable property

within which (a) such parish or place, for the amount of the rates for which such parish or place may be liable as aforesaid." Sect. 3 provides for the appointment, by the council, of overseers for the part of a parish which is within the borough, in cases where a parish is partly within and partly without it, for the making, levying, and collecting the watch-rate in the included part. From these provisions it is obvious that the watch-rate, if not a parochial rate, is yet a public levy collected by the parish officers from all inhabitant occupiers within the parish; and is, therefore, to be regarded as one of the "public" "levies of the parish," within the meaning of those words in stat. 3 & 4 W. & M., c. 11, s. 6. The case is distinguishable from *Rex v. Christchurch*, 8 B. & C. 660 (E. C. L. R. vol. 15), where it was held that a person did not gain a settlement by being assessed to and

*782] *paying the watch-rate in the city of London; the ground of the decision being that that rate was assessed upon and collected from the rate-payers as inhabitants, not of parishes, but of wards. Bayley, J., in giving judgment, said, "The land-tax was holden to be within the Act from the notice of inhabitancy that arises by the party's having been assessed, and paid it. Payment towards a county bridge gives no settlement, because the person pays as an inhabitant of the county, and not of the parish. This watch-rate is not a parochial tax, nor is it collected by any officer belonging to the parish. The parish had not notice that the party who paid the watch-rate was an inhabitant of the parish. No settlement, therefore, was gained." In the note (a) to stat. 3 & 4 W. & M., c. 11, s. 6, in Chitty's Statutes, by Welsby, vol. 3, p. 662 (2d ed.), it is said: "All that is requisite under this statute is, that the parish officers shall rate the party, so as to show that they are aware that he is in the parish, and that he should pay upon such rating." Further on, after remarking that county-rates (amongst others) are not public taxes within the statute, the note proceeds: "But as stat. 12 G. 2, c. 29, charges a sum certain upon every division in proportion to their poor-rate, towards the repair of bridges and other county expenses, and (with respect to bridges) is charged by the justices upon every individual, the case may be altered since that Act was passed, under which it may be considered a parish-rate or tax. And there is in this case the same notoriety of inhabitancy as in the case of the poor-rate." Notoriety of inhabitancy is therefore the test; and it exists in every case, such as the present, where the rate is levied upon inhabitants quâ parishioners,

*783] and collected from them by the parish officers. *In *Rex v. East Teignmouth*, 1 B. & Ad. 244 (E. C. L. R. vol. 20), it was held that a parochial rate is a levy raised within the district called a parish, and if so raised is not the less parochial though it be applicable to other than parish purposes. In *St. Giles, Cripplegate, v. St. Mary in Newington*, Foley's Poor Laws 135 (ed. 3), the question was whether paying to a scavenger's-rate was sufficient to gain a settlement without notice; and, upon reading stat. 2 W. & M., c. 8, s. 10, which makes those rates either parish-rates, ward-rates, or division-rates, the Court was of opinion that, if the rate was confined to a parish, the paying of that rate would be sufficient to gain a settlement. Lastly, it will be said, on the other side, that the watch-rate levied in

Everton is not a public tax or levy such as to satisfy stat. 3 & 4 W. & M., c. 11, s. 6, because, under the proviso in stat 5 & 6 W. 4, c. 76, s. 92, a part of the township may be exempted from it. But neither does it appear from the case that any part of the place is thus exempt; nor, if there be such a part, is the rate less a public tax on that account. Nothing more is required by the Act of William and Mary than that the tax should be charged and paid within the parish: *Rex v. St. Bees*, 9 East 203.

Aspinall, for the appellants.—From the opinion already expressed by the Court, that the pauper's husband did not pay his share towards the poor-rate for Everton, with which he was charged, it follows that he did not pay his share towards the public taxes or levies of Everton, even should the Court decide that the watch-rate was such a public tax or levy: for, the words "taxes or levies" in stat. 3 & 4 W. & M., c. 11, s. 6, *being in the plural, payment of a single tax or levy is not sufficient for the purpose of gaining a settle- [*784 ment. But this watch-rate was not a public tax or levy: inasmuch as the overseers, under the warrant directed to them, were empowered to levy it on the occupiers in part only of the township. [COCKBURN, C. J.—The rate was levied on the occupiers quâ parishoners, and was, surely, a parochial tax upon those who had to pay it.] The overseers had no notice, as parish officers, that the ratepayers were inhabitants of the parish; they levied the rate only as agents of the town council of Liverpool. The rate was levied on Everton regarded not as a parish but as part of the borough of Liverpool. It so happens that the whole of Everton is in that borough; but had it been partly without the borough the rate could have been levied in that part only which was within the borough. This consideration shows that the rate is not to be deemed a parochial tax or levy.

COCKBURN, C. J.—With respect to the first point which has been made, I am of opinion that no settlement was gained by the pauper's husband by payment of the poor-rate. That rate was one made for an entire year, and was payable, not by instalments, as in the cases which were cited on the first point, but in præsentia, and in one payment. Instead of paying it at once, Wadham, the pauper's husband, waited for seven months, and then, by arrangement with the overseers, paid seven-twelfths only of the whole amount of the rate; such payment being in proportion to the period during which he continued to be an occupier after the rate had been made. Now stat. 3 & 4 W. & M., c. 11, s. 6, provides that if any inhabitant in a town or parish **"shall be charged with and pay his share of the public taxes or levies of the said town or parish"* he shall gain a settlement [*785 there. In order to satisfy these words, the inhabitant must pay the whole of the rate with which he is charged; and this Wadham did not do. I am, however, of opinion that Wadham did gain a settlement by his payment of the watch-rate. In the first place, I do not agree with the argument that, if a man is assessed to two distinct and independent rates, and pays only one of them, he fails to satisfy the statute. I think that the exigency of the statute is satisfied by the payment of any one distinct rate or tax levied in the parish, if it be such a one as answers to the description of a public tax or levy of the parish. The question therefore is, was this watch-rate a public paro-

chial tax or levy? Upon consideration, I think that it was. The town council of Liverpool were the persons entitled, in the first instance, to make the rate. They determined to make it, and that it should be levied in, amongst other parts of the borough, the township of Everton. They ordered the overseers of Everton to make returns (which they made) of the rateable property in the township; and the overseers were thereupon further ordered to make, levy, and collect the watch-rate upon and from the occupiers of all rateable property within the township, with certain local exceptions. It cannot be disputed that, if the rate had been levied by the parish officers over the whole of the township, it would have been a public parochial levy. The rate is, however, to be levied upon an aggregate of townships and parishes, together constituting the borough of Liverpool, and each of these is to contribute its proportion, to be raised from the inhabitant occupiers in each. Can it be said not to be a parochial levy, by *786] *reason of the circumstance that it is not leviable on certain, and probably very small, portions of each township and parish? I think not, having regard to the principle upon which the statute of William and Mary legalizes the acquisition of a settlement by coming to inhabit in a parish and by being charged with and paying a share of the public taxes or levies there; namely, that such charge and payment acts as notice to the parish officers of the inhabitancy of the person charged and paying, and exempts that person from the necessity of giving the notice of inhabitancy which the Act in other cases requires. For the purpose of affecting the parish officers with notice of the inhabitancy, to be inferred from the charge and payment, it is sufficient that the rate is levied upon the person charged and paying it quâ an occupier in the parish. If so, it is, as regards him, a parochial tax, and he is entitled to the benefit of the exemption given by the statute: whether the tax is paid by the whole or by part only of the occupiers in the parish.

CROMPTON, J.—Upon the first point, I agree entirely with the Lord Chief Justice, that the settlement was not gained by payment of the poor-rate, the whole of that rate not having been paid. Upon the second point I also agree with him that, if the pauper's husband was charged with and paid any one of the public taxes or levies of Everton, the settlement was gained. But as to the main question which arises upon that point, namely, whether the watch-rate was such a public tax or levy, I have felt and still entertain considerable doubt; though not to such an extent as to lead me to dissent from my Lord's *787] judgment. My doubts are of the less importance, *as the order of removal must stand unless the Court is unanimous that it is wrong. The rate would clearly, from its nature, be a parochial tax, if levied on the whole of each parish and township; for it is levied by the parish officers, and collected from the ratepayers in their capacity of inhabitants of the parish, so that notice to the parish officers of the inhabitancy of the persons charged and paying arises, within the principle laid down by Bayley, J., in *Rex v. Christchurch*, 8 B. & C. 660 (E. C. L. R. vol. 15). My difficulty proceeds from the wording of stat. 3 & 4 W. & M., c. 11, s. 6, which speaks of the public taxes or levies "of the said town or parish." Now, here, the watch-rate was made for particular parts only of the township, and levied

on the occupiers of those parts only. Still, as the Lord Chief Justice has observed, the occupiers actually rated were rated as inhabitants, and, so far as they are concerned, the presumption that the parish officers had notice of their inhabitancy arises. Mr. *Aspinall*, in his argument, put the case of a watch-rate levied in a parish which was partly within and partly without a borough. Had the present been that case, I think that no settlement could have been gained by payment of the rate; because the rate, there, could not have been levied upon the whole of the parish but upon that part only which was within the borough. But in the case before us the whole of the township is within the borough, and it is quite possible that the rate may be levied upon the whole of it; the only exemption being in favour of occupiers who reside more than 200 yards distant from any regularly watched street or continuous line of houses, and the growth of the population tending to bring the *whole of the township [*788 gradually within the area of taxation, as the regularly watched streets and lines of houses are multiplied. Upon the whole, therefore, I am not satisfied that the watch-rate was not a public levy or tax of Everton, within the meaning of the statute of William and Mary.

(HILL, J., and BLACKBURN, J., were absent.)

Order confirmed.

The QUEEN, on the Prosecution of The Inhabitants of the Township of HECKMONEDWICKE, Respondents, v. The Inhabitants of the Township of THORNTON, Appellants. April 28.

An order of removal of the pauper, a married woman, from the respondent to the appellant township, was appealed against on the ground that she, by derivative settlement from her husband, was settled in a third township by estate acquired by him there, through her. Thereupon a case was stated, under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court on the following facts.

The appellant township was the settlement of the pauper's husband before marriage. Before and at the time of the marriage, the pauper rented a cottage in H., the third township, at 1s. a week. From and after the marriage, her husband resided with her in the cottage for seven years; during which he paid the said weekly rent, and since which he had gained no other settlement.

Upon these facts, held: That the pauper's settlement, through her husband, was in H.: for that he, by the marriage and residence in the cottage for forty days thereafter, acquired a settlement by estate in H. in right of his wife, her tenancy from week to week having vested in him by the marriage; and, though then determinable, not having been determined within the forty days. That a determination of the wife's tenancy and the commencement of a new one by the husband, could not be presumed from the fact, consistent with either tenancy, that he, after the marriage, paid the rent; and that the actual, though at the time of the marriage uncertain, continuance of the wife's estate for forty days after the marriage, was sufficient for the purposes of the settlement.

CASE stated by consent, and by order of Blackburn, J., under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of the Court, on an appeal to the Quarter Sessions of the West Riding of Yorkshire against an *order of justices, dated 26th September, 1859, for the removal [*789 of Mary Walker, wife of James Walker, from the township of Heckmondewicke to the township of Thornton, both in the West Riding.

In the year 1849, the pauper, then Mary Collins, a widow, was

tenant of and residing in a cellar cottage, situate in the township of Horton, at the rent of 1s. per week, under Mr. John Steel, the landlord. On 23d September, 1849, and whilst she was such tenant and residing in the said tenement, she was married to James Walker; and at the time of the marriage his last place of settlement, through his father, was the appellant township. From and after their marriage, the said James Walker resided with his wife in the township of Horton, and occupied the tenement which she was renting and occupying at the time of their marriage; and he so continued to reside therein for the period of seven years following, during which he paid the weekly rent for the same; and ever since the expiration of the said period of seven years, he has inhabited within ten miles of the said tenement, and has never since gained any settlement elsewhere. Upon these facts the appellants contended that the settlement of the pauper, Mary Walker, was, at the time of the application for the said order, in the said township of Horton, which settlement she derived from the said James Walker, who, they alleged, had gained therein a settlement by estate, as the result of the marriage and residence as aforesaid.

If the Court should be of opinion that the pauper was settled in the township of Horton, as contended by the appellants, the order of removal was to be quashed; but if the Court should be of opinion *790] that the pauper was *not settled in the township of Horton, the order of removal was to be confirmed.

Pickering, for the respondents.—The question is purely one of fact; whether, upon the facts stated, the pauper's husband acquired any settlement by estate upon his marriage. It is clear that he did not. In order to gain such a settlement by marriage he must have become possessed, in right of his wife, of a term which, at the time of the marriage, had at least forty days to run. In all the cases where it has been held that a man has gained a settlement by estate by marriage, the wife has been at least a tenant from year to year, with forty clear days of that tenancy unexpired when she married. Here, the woman was only a weekly tenant; and such a tenancy is certain for a week only, or, at most, a fortnight. It is true that in *Regina v. Halifax*, 4 E. & B. 647 (E. C. L.R. vol. 82), the question was mooted in argument, and discussed in the judgment of the Court, whether a man can gain a settlement by estate by marrying a woman who is a mere tenant at will, provided that the will is not determined during the forty days next after the marriage, and he resides on the estate for that time. The Court, however, did not decide that a settlement could be gained under such circumstances. [CROMPTON, J.—Though the point was not decided, the inclination of the opinion of the Court was evidently in favour of the acquisition of the settlement.] Again, it is consistent with the facts, in the present case, that the wife's estate was *791] determined, on the marriage, and the husband accepted by the *landlord as tenant in her stead. [COCKBURN, C. J.—Unless the marriage, per se, made the wife's estate the husband's (and it clearly did not), there is no evidence that anything was done to put an end to her estate. It does not appear that the landlord intervened.] The payment of the rent by the husband is some evidence that he had become tenant. In *Rex v. Barnard Castle*, 2 A. & E. 108 (E. C.

L. R. vol. 29); Lord Denman, C. J., and Taunton, J., differing from Patteson and Williams, Js., held that the widow of a yearly tenant who, after his death, did not take out administration, but continued to reside on the premises with her children, and made two half-yearly payments of the rent due subsequently to his death, commenced, at his death, a new tenancy on her own account, and did not continue in possession as a party entitled, but neglecting, to take out administration. The facts in the present case are equally strong to show that, from the time of the marriage of the pauper, a new tenancy by her husband was created.

Maule, contra.—The payment of rent weekly by the pauper, before her marriage, is not inconsistent with the fact that the tenancy was for a year. The Court is not, however, asked to draw inferences of fact, nor can it do so upon a case stated under stat. 12 & 13 Vict. c. 45, s. 11. On the face of the case it sufficiently appears, even if the tenancy was from week to week, that the pauper's husband gained a settlement by estate, in Horton, in her right; for the case finds that she was tenant of the cottage at the time of their marriage, and that he resided in it for the seven years following. In *the absence* [*792 of all evidence to the contrary, the Court must presume that her tenancy continued, de facto, during all that time. It is clear that in *Rex v. Halifax*, 4 E. & B. 647 (E. C. L. R. vol. 82), the Court was prepared to hold that a mere tenancy at will in the wife, at the time of the marriage, is sufficient to confer a settlement by estate upon the husband, in her right, if the will is not in fact determined during the forty days following the marriage. [CROMPTON, J.—A tenancy for any term must be considered to continue, until legally determined. Although, in *Tomkins v. Lawrance*, 8 C. & P. 729 (E. C. L. R. vol. 34), Patteson, J., held that a tenancy from year to year recommences every year, *Doe dem. Hull v. Wood*, 14 M. & W. 682,† establishes the contrary, and that the onus of showing a legal determination of such a term rests upon the person who contends that it is at an end.]

COCKBURN, C. J.—It is plain that the pauper's tenancy must be deemed to have continued after her marriage, as the contrary is not shown. The only question is whether, in order to the acquisition of the settlement by her husband, her tenancy must, at the time of the marriage, have been one for at least forty days certain from that time. That, however, was unnecessary. If a man remains in possession of his wife's estate for forty days after the marriage, and the estate, during that time, continues undetermined though determinable, he, at the end of that time, becomes irremovable.

CROMPTON, J.—In this case the estate of the pauper was a tenancy from week to week, so long as she and the landlord pleased; that is, until the tenancy was *determined by the one or the other. [*793 Then, her husband acquired this estate by the marriage, and subsequently resided forty days in the tenement. He thereby acquired a settlement, unless the estate of the wife had been put an end to and a new tenancy by the husband created. There is nothing in the case to show any determination of her estate: the fact that the husband paid the rent is not sufficient for that purpose; he being the person who would pay it, whether the estate continued hers or had become his.

(HILL, J., and BLACKBURN, J., were absent.)

Order of removal quashed.

The QUEEN, on the Prosecution of the Overseers of HERNHILL,
v. The Rev. WILLIAM JOHN GROVES, Clerk. *April 28.*

The Archbishop of Canterbury, being the owner of the impropriate rectory and tithe rent-charge of the parish of H., and of land thereto appertaining, granted, under The Augmentation Acts, 29 Car. 2, c. 8, and 1 & 2 W. 4, c. 45, to the perpetual curate of T. (a separate and distinct parish from H.) an annual rent of 40*l.*, to be charged upon and yearly issuing out of the said rectory, tithe rent-charge, and land. Subsequently to this grant, the Archbishop leased the said rectory, tithe rent-charge, and land to G., a clergyman, for twenty-one years, G. to yield and pay yearly, during the term, to the Archbishop, 9*l.* 13*s.* 4*d.*, and also 6*l.* 16*s.* for redeemed land-tax; and also to the perpetual curate of T. the said sum of 40*l.*, in augmentation of the revenues of the curacy.

Held that, in assessing G. to the poor-rate of H. as occupier of the tithe rent-charge of H., no allowance was to be made to him in respect of his yearly payment of the 40*l.*; for that the whole of the rent-charge was included in the demise to him, and the 40*l.* was part of the rent paid by him for the occupation of the whole, not so much of the whole withdrawn from his occupation.

THE appellant, the Reverend W. J. Groves, entered and prosecuted, *794] at the Kent Midsummer Quarter *Sessions, 1859, an appeal against a poor-rate made upon him by the respondents, the overseers of the parish of Hernhill, in that county, in respect of his occupation as lessee and occupier of the rectorial tithe rent-charge of that parish: on the grounds, first; That he was over-rated in respect of the yearly value of the said tithe rent-charge by him received in the parish of Hernhill; and, secondly; That the assessment was unfair and incorrect, for that it was not made upon an estimate of the rent at which the said rent-charge might reasonably be expected to let from year to year, free of all the usual tenant's rates and taxes, and that the proper and legal deductions had not been made in accordance with the provisions of stat. 6 & 7 W. 4, c. 96, entitled "An Act to regulate parochial assessments," and particularly that no allowance or deduction had been made, in assessing the said rate, in respect of the sum of 40*l.*, charged upon the said tithe rent-charge, and payable by the appellant, as such occupier as aforesaid, to the perpetual curate of Thannington, in the said county.

The Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The Archbishop of Canterbury, in right of his see, is the owner of the impropriate rectory and parsonage and tithe rent-charge of the parish of Hernhill, and of certain lands and tenements therein, belonging or appertaining to the said rectory and parsonage. The perpetual curacy of Thannington (which is a separate and distinct parish, at a distance from the parish of Hernhill) is in the patronage of the archbishop, in right of his see. Under the provisions of The Augmentation Acts, 29 Car. 2, c. 8, and 1 & 2 W. 4, c. 45, and of the powers *795] thereby conferred, the late Archbishop of Canterbury, by an indenture dated 28th June, 1832, and made between himself of the one part, and the Rev. Charles Graham, Clerk, perpetual curate of Thannington, of the other part, granted to the said Charles Graham and his successors, perpetual curates of Thannington, one annual rent or yearly sum of 40*l.*, to be charged upon and yearly issuing or payable out of the rectory or parsonage of Hernhill and the other premises comprised in the lease of which a copy accompanied the

case: To hold the same unto the said Charles Graham and his successors, perpetual curates of the said perpetual curacy of Thannington, for ever, subject to the power, given by the said Act last mentioned, of deferring the time from which the said annual rent or yearly sum was to commence or to take effect in possession. This power was exercised, and the first payment of the said rent or sum became payable on 25th March, 1848. The rectory tithe rent-charge of Hernhill, and other premises, were, on 29th May, 1855, leased by the present Archbishop of Canterbury to one Thomas Starr (since deceased) and the appellant, by an indenture a copy of which was to be taken as part of the case. The substance of this indenture, so far as is material, was as follows.

The indenture witnessed that the Archbishop "Hath demised, granted, and to farm letten, and by these presents for himself and his successors doth demise, grant, and to farm let, unto the said Thomas Starr and William John Groves, all that the rectory and parsonage of Hernhill in the county of Kent, and all the houses and buildings, land, tenements, tithes, rent-charges in lieu of tithes, oblations, obventions, profits, commodities, and advantages whatsoever, to the said rectory or *parsonage belonging or in anywise [*796 appertaining, with all and singular the appurtenances; and also the tithes or rent-charge in lieu thereof of one Marsh, called Mendley Marsh, in Hernhill aforesaid, parcel of the said rectory," excepting and reserving to the Archbishop, his successors and assigns, the advowson of the vicarage of Hernhill, and the trees, woods, and underwoods growing or to grow on the demised premises during the demise; to hold the said premises, with their appurtenances, unto the said lessees, their executors, &c., for the term of twenty-one years from 17th January then last past; yielding and paying yearly, during the term, unto the Archbishop, his successors or assigns, the sum of 9*l.* 13*s.* 4*d.* and also the sum of 6*l.* 16*s.* for redeemed land-tax, at the four usual quarter-days: and also yielding and paying yearly, during the said term, to the perpetual curate for the time being of Thannington, the clear sum of 40*l.*, in augmentation of the revenues of the said perpetual curacy, by equal half-yearly payments on 25th March and 29th September. Proviso for re-entry by the Archbishop, his successors or assigns, if the said yearly rents of 9*l.* 13*s.* 4*d.* and 6*l.* 16*s.*, or either of them, or any part thereof respectively, should be in arrear for twenty-one days, or if any of the covenants on the lessees' part should be broken. Covenant by the lessees (inter alia) to pay the two rents reserved to the Archbishop, &c., and also the 40*l.* per annum to the perpetual curate for the time being of Thannington.

The tithes of the parish of Hernhill have been commuted under The Tithe Commutation Acts, and form the chief subject-matter of the demise. The amount receivable by the lessee, for the years 1858 and 1859, according to the corn averages, was 744*l.* 15*s.* 5*d.* The *land comprised in the lease is of trifling extent, and consists [*797 of about half an acre. There are now no buildings on the lands demised. The obventions, &c., comprised in the lease, are of no value at all. For a great many years past, the Archbishop of Canterbury for the time being has let the rectory and tithes of Hernhill,

and the other premises mentioned in the lease, to lessees, for terms of twenty-one years. It has been the practice every seven years, for the lessees to surrender their lease and to receive a new one for a fresh term of twenty-one years, on payment of a fine to the Archbishop. The amount of the fine on each renewal was settled by agreement between the parties. Since the grant of the augmentation to the curate of Thannington, the lease has provided that the tenant should pay it, as in the lease referred to; and the Archbishop has demanded and received a smaller fine for the renewals, making allowance, in calculating the fine, for the payments which the tenants have to make and have always duly made to the curate of Thannington. The fine paid by the lessees to the Archbishop, on the granting of the lease of 1855, was calculated at two years' value of the premises comprised therein, viz., the gross income receivable therefrom for two years, less twice the amount of annual outgoings and deductions for all rates, repairs of chancel, ecclesiastical dues, &c., and the sum of 80*l.*, being twice the amount payable annually by the lessees to the curate of Thannington. The lessees under the last-mentioned lease, or the appellant as surviving lessee since the death of the said Thomas Starr, had duly continued such payments till the making of the under-mentioned rate. The appellant, on 1st April, 1859, was rated *798] to the relief of the poor by the respondents, in *respect of his occupation of the rent-charge, as surviving lessee under the lease recited in the case. The gross estimated rateable value was charged as 620*l.*, and the net rateable value set at 525*l.* In making the assessment the respondents refused to make any deduction or allowance in respect of the said payment of 40*l.* per annum, made by the appellant to the perpetual curate of Thannington under the circumstances above detailed. The appellant thereupon appealed to the Quarter Sessions, on the ground that he was overrated; and it was agreed between himself and the respondents that the only question to be raised should be, whether the respondents were right or wrong in refusing to make any deduction in respect of the said payment.

The question for the opinion of the Court was, Whether or not any allowance or deduction should have been made by the respondents in assessing the appellant to the poor-rate of Hernhill, as occupier of the said rent-charge, in respect of the aforesaid payment of 40*l.* to the perpetual curate of Thannington for the time being?

If the Court should be of opinion that a deduction should have been made, then the order of the Quarter Sessions, confirming the rate, was to be quashed, and the rate amended by reducing by 40*l.* the sum now standing in the rate-book of the said parish, as the rateable value of the said rent-charge.

F. Russell appeared for the respondents; but the Court called upon *F. M. White*, for the appellant.

F. M. White, for the appellant.—The 40*l.* per annum which the appellant pays to the perpetual curate of Thannington is not a part *799] of the rent which he pays to the *Archbishop for the occupation of the tithe rent-charge, but is so much of the rent-charge withdrawn from his occupation. Stat. 29 Car. 2, c. 8, s. 2, enacts, "That all and every augmentation of what nature soever" "which shall at any time hereafter be granted, reserved, or made payable to

any vicar or curate, or reserved by way of increase of rent to the lessors, but intended to be to or for the use or benefit of any vicar or curate, by any Archbishop" "so making the said reservation out of any rectory impropriate, or portion of tithes, belonging to any Archbishop" "shall be deemed and adjudged to continue and be, and shall for ever hereafter continue and remain, as well during the continuance of the estate or term upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards, in whose hands soever the said rectories or portion of tithes shall be or come; which rectories or portion of tithes shall be chargeable therewith, whether the same be reserved again, or not; and the said vicars and curates are hereby adjudged to be in the actual possession thereof, for the use of themselves and their successors, and the same shall for ever hereafter be taken, received, and enjoyed by the said vicars and curates, and their successors, as well during the continuance of the term or estate upon which the said augmentations were granted, reserved, or agreed to be made payable, as afterwards." The provisions of this statute are explained and extended by stat. 1 & 2 W. 4, c. 45. The effect of these enactments is, that the tithes of Hernhill, to the annual amount of 40*l.*, are in the possession, not of the appellant, but of the perpetual curate of Thannington. The annual value of the appellant's occupation of the tithe rent-charge is reduced by that amount, which is a *charge upon it in addition to the rent reserved to the Archbishop, the amount of which does not appear to have [*800 been reduced since the imposition of the charge. The limit of the rateability of an occupier to the poor-rate is the rateable value of the hereditament which he beneficially occupies: *Regina v. Thurlestone*, 1 E. & E. 502 (E. C. L. R. vol. 102). Now, *Hackney and Lamberhurst Tithe Commutation Rent Charges*, E. B. & E. 1 (E. C. L. R. vol. 96), shows that the appellant is not in the beneficial occupation of this annual 40*l.* [COCKBURN, C. J.—You contend that the Archbishop, when he let the tithe rent-charge to Starr and the appellant, could not let the whole of it, having previously divested it of a certain portion in favour of the curate of Thannington, so that whoever took it afterwards took it minus that portion.] That is the contention on behalf of the appellant, and it is supported by the judgment of the Court in *Hackney and Lamberhurst Tithe Commutation Rent Charges*, E. B. & E. 49 (E. C. L. R. vol. 96), where it was held that, in the assessment of a commutation tithe rent-charge to the poor-rate, an allowance was to be made in respect of the payment by the rector of 50*l.* per annum towards the support of the minister of a district church or chapel in the parish, provided that such payment formed part of the parliamentary endowment of the district, and could not be withdrawn by the rector; the Court saying that the rector "in such case, though he may with one hand receive the 50*l.*, yet" "may be bound to pay it with the other, so that in substance it is not his; and" "he ought not to be rated for it; for it is not beneficially in his occupation any more than if it had been a portion of the glebe which he had given up for the same purpose." In *Regina v. Lumsdaine*, 10 A. & E. 157 (E. C. L. R. vol. 37), it *was held that the object of The Parochial Assessment Act, 6 & 7 W.-4, c. 96, was, not [*801 to introduce any new principle of rating, but to affirm that which

had been already established; and it had been already established, in *Rex v. Adames*, 4 B. & Ad. 61 (E. C. L. R. vol. 24), that lands are rateable to the poor-rate in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges, and outgoings. Upon that principle, the appellant is entitled to deduct the 40*l.* from the amount at which he is rateable, for that sum is a charge and outgoing paid by him, and is no part of the rent which he pays the Archbishop.

F. Russell, for the respondents.—It is apparent, from the terms of the appellant's lease, that he is the occupier of the whole of the tithe rent-charge, including the 40*l.* in question, which is really part of the rent which he pays for the whole subject-matter of the demise, which includes land as well as tithes. It is true that he pays the 40*l.*, by the Archbishop's direction, to the perpetual curate of Thannington instead of to the Archbishop direct; but unless he did this he would have to pay either a larger annual rent to the Archbishop or a heavier fine upon renewals. *Frend v. Churchwardens of Tolleshunt Knights*, 1 E. & E. 753 (E. C. L. R. vol. 102), shows conclusively that the 40*l.* is not in the occupation of the perpetual curate of Thannington, and that he would not be rateable in Hernhill in respect of it. Unless, therefore, the Archbishop is rateable, which is out of the question, the appellant must be; and that he is so may fairly be inferred from the decision in *Frend v. Churchwardens of Tolleshunt Knights*.

*802] **COCKBURN, C. J.*—I have entertained some doubts during the argument; but, on the whole, I think that the annual 40*l.* charged upon the appellant in favour of the perpetual curate of Thannington is quite analogous to the ordinary case of a rent-charge charged on land. Looking at the terms of the appellant's lease, I think that he has undertaken to pay, as rent for the land, tithes and tithe rent-charge demised to him, not only the sum expressly reserved as rent to the Archbishop, but also the 40*l.* in question. The fact that he has to pay this 40*l.* to the curate of Thannington does not prevent it from being paid as part of the consideration for the appellant's tenancy of, amongst other things, the whole of the tithe rent-charge. The whole rent-charge is in his occupation, and he is therefore assessable in respect of the whole.

CROMPTON, J.—Every occupier of tithes impropriate is rateable. The appellant is such an occupier, and the only question is, to what extent? It appears to me that he occupies the whole rent-charge. The test is, what would a tenant give for the occupation? Now the appellant is tenant under a lease for twenty-one years; by which he covenants to pay this sum of 40*l.*, amongst others, annually, in respect of his occupancy. Although this sum might have been reserved by the lease to the Archbishop, the landlord, and have been afterwards paid over by the Archbishop to the curate of Thannington, the arrangement that the appellant is to pay it direct to the curate does not make it the less part of the rent which the appellant pays for the occupation of the whole of the land and tithes demised.

(*HILL, J.*, was absent.)

*803] **BLACKBURN, J.*—I am of the same opinion. The person rated ought to be rated according to the value of the rateable property which he occupies, and that value is the rent at which the

property might reasonably be expected to let from year to year. Then, what does the appellant occupy? He occupies the whole of the land, tithes, and tithe rent-charge comprised in the lease. *Frend v. Churchwardens of Tolleshunt Knights*, 1 E. & E. 758 (E. C. L. R. vol. 72), shows that the curate of Thannington is not in occupation of the rent-charge of 40%. The appellant has the whole beneficial occupation, just as he would have it if he paid the 40% to the Archbishop instead of to the curate. *Hackney and Lamberhurst Tithe Commutation Rent Charges*, E. B. & E. 1 (E. C. L. R. vol. 96), proceeded on the principle that the sum paid annually by a rector towards the support of the minister of a district in his parish is occupied by the rector quâ clergyman of the parish, and not beneficially; but, in the present case, the appellant, though a clergyman, does not occupy the tithe rent-charge in that capacity.

Order of Sessions confirmed.

POTTER v. PARR. *April 30.*

[Reported, 2 B. & S. 216.]

*PHILLIPS v. WHITSED. *May 1.*

[*804]

Declaration in replevin, charging that defendant in close A. and also in close B. took the goods of plaintiff.

Avowries. 1. As to the taking in A., that defendant took the goods there as a distress for arrears of rent due from plaintiff on a demise of A. to him by defendant. 2. The like (*mutatis mutandis*) as to the taking in B.

Plea in bar to both avowries. That defendant did not make a separate and distinct distress upon A., and another upon B., for the separate rents in arrear; but illegally took one joint distress in A. and B. for the several arrears of rent in the avowries respectively mentioned.

Demurrer. Joinder in demurrer.

Held, that the plea in bar was bad; for that a man may profess to distrain for one cause and may avow for another, if a good one; and that as the avowries (admitted by the plea in bar to be true) showed that defendant had a good cause for distraining as he had done, it was immaterial that defendant had, when distraining, assigned an invalid reason for the distress.

REPLEVIN. Declaration that defendant, in the parish of Crowland, in a certain dwelling-house there, called the Carpenters' Arms, took the goods and chattels of plaintiff, to wit, divers chairs, tables, forms, &c.; and in a certain garden there took certain garden produce, to wit, cabbages, potatoes, and beans, and other vegetables and fruit of plaintiff; and in a certain close there, called The Lot, took the corn of plaintiff, to wit, ten acres of wheat there growing, and a stack of wheat there standing; and unjustly detained the same against sureties and pledges.

Avowries. 1. As to taking the said goods in the said dwelling-house called The Carpenters' Arms, and the said garden produce in the said garden, that for a long time before, and until and at the said time when, &c., plaintiff held and occupied the said dwelling-house and garden in which, &c., as tenant thereof to defendant, under a certain demise thereof to plaintiff by defendant theretofore made, at and under a certain rent of 20% per annum payable half-yearly; the

reversion thereof then and still belonging to defendant. That at the said time when, &c., three years of the said rent was due and in *805] *arrear from plaintiff to defendant; and avowing the taking as for and in the name of a distress for the said rent.

2. As to taking the said corn in the close called the "Lot," that for a long time before, and until and at the said time when, &c., plaintiff held and occupied the said close as tenant thereof to defendant, under a certain demise thereof to plaintiff by defendant theretofore made, at and under a certain rent of 8*l.* per annum, payable half-yearly; the revision thereof then and still belonging to defendant; and avowing the taking as a distress for three years' arrears of the said rent.

Plea in bar to the first and second avowries. That defendant did not make a separate and distinct distress in and upon the said dwelling-house and garden in the first avowry mentioned, for and in respect of the said rent therein alleged to have been in arrear for and in respect of the said dwelling-house and garden, and also a separate and distinct distress in and upon the said close in which, &c., in the second avowry mentioned, for and in respect of the said rent therein alleged to have been in arrear for and in respect of the said close; but on the contrary thereof, at the time when, &c., illegally made and took one joint distress, as, for, and in respect of the said several arrears of rent in those avowries respectively mentioned, in and upon the said dwelling-house and garden and also in and upon the said close in those avowries respectively mentioned; which is the distress in each of those avowries acknowledged, and therein respectively attempted to be justified.

Demurrer. Joinder in demurrer.

*806] *H. T. Cole*, in support of the demurrer.—The plaintiff's *plea in bar is bad. Admitting the truth of the facts stated in the two avowries, which show that the defendant had a clear right to distrain both in the dwelling-house and garden and in the close, the plea seeks to deprive him of the goods distrained, by reason of his mere informality or irregularity in making a joint distress for the separate rents in arrear. The plea amounts only to this, that the defendant did not say, when distraining, that he took the goods in the house and garden in respect of the rent in arrear for them, and the goods in the field in respect of the rent in arrear for the field. Granting, however, that he then professed to make a joint distress for both rents, he did not thereby lose his right to set up afterwards, in his avowries, the good cause of justification for distraining which he really had. It is settled law that a man may distrain for one cause and avow for another. In *Crowther v. Ramsbottom*, 7 T. R. 654, 657, Lord Kenyon, C. J., says, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot service." That doctrine has been considered to be somewhat qualified by the judgment of the House of Lords in *Lucas v. Nockells*, 10 Bing. 157 (E. C. L. R. vol. 25); but in that case the Judges, in giving their opinions to the House, expressly recognised *Crowther v. Ramsbottom* as good law.^(a) [BLACKBURN, J., referred to *Governors of Bristol Poor v. Wait*, 1 A. & E. 264 (E. C. L. R. vol. 28).] That

(a) See especially Parke, J.'s, opinion at p. 172.

case is strongly in point for the defendant. It was there held that, if a party enter and make a joint distress for four several rates, being furnished for that purpose *with four warrants, one of which is bad, he may, in an action of replevin for such distress, justify [*807 under the good warrants, and abandon the bad one; and that, if the causes of taking are distinct, and the avowries separate, he will be entitled to a return of all the goods. In the present case the defendant had a good cause for distraining; the distress, therefore, was not an act amounting to a legal injury to the plaintiff, who has consequently no legal right to complain of it on the mere ground that it was made with a wrongful intention: *Stevenson v. Newham*, 13 C. B. 285 (E. C. L. R. vol. 76).

The Court here called upon *Quain*, *contra*.

Quain, in support of the plea in bar.—The plea is good. It shows that the defendant made but one distress in closes A. and B. as well for rent issuing out of A. only, as for rent issuing out of B. only; that is, that he distrained in A. for rent issuing out of B., and in B. for rent issuing out of A. A joint distress for rent due upon two distinct demises of different premises cannot be justified: *Rogers v. Birkinire*, Ca. temp. Hardw. 245, s. c. 2 Str. 1040. [COCKBURN, C. J.—In that case, goods were distrained in a house for rent due for a stable; and this amounted to a trespass to the house. In the present case, goods were distrained in the proper place for the proper rent, although an erroneous statement of the ground for distraining was made. A joint distress for rent due upon separate demises is wrongful only if something is taken on one close in respect of the rent due for another.] That is, in effect, what the defendant did. [CROMPTON, J.—Looking at the avowries, the truth of which is admitted, we *must assume that the goods taken by the defendant on close [*808 A. and on close B. respectively, were respectively goods which might be so taken for rent due for each of those closes respectively. You are in substance contending that a wrong distress cannot be cured by a right avowry.] *Bedford v. Warden of Sutton Coldfield*, 3 C. B. N. S. 449 (E. C. L. R. vol. 91), is undistinguishable from the present case. It was there held that a distress upon land for a joint sum made up of a rent-charge to which it was chargeable, and of another to which it was not, could not be justified. [COCKBURN, C. J.—There, one piece of land was distrained upon for rent due for several. But here, rent was due in respect of each of the closes on which the distress was levied.]

COCKBURN, C. J.—Our judgment must be for the defendant. There is no doubt that if a person having a right to distrain makes, on distraining, some statement as to the character of the distress which, if the only ground in fact for the distress, would render it illegal, he may yet plead afterwards by way of avowry setting out the real and true ground on which he had a legal right to distrain. Here, as appears upon the pleadings, the defendant put in a distress upon a house and garden and also upon a close, held under separate demises, on each of which rent was due; and took no more goods upon the house and garden and the close respectively, than were sufficient to satisfy the rent in arrear for each respectively. In substance, therefore, he was right; but then it is objected that he made the distress as a joint

*809] distress for the *aggregate rent. Now it cannot be disputed that, if rent is due to a landlord for close A. and other rent for close B., and he distrains on close A. for both rents, or vice versa, the distress is illegal. But if he in fact distrains upon each close, for the rent due for each, and takes no more, in each, than is enough to satisfy the respective separate rents, he may set himself right, when he comes to make avowry, if he has committed any irregularity. In the case cited by Mr. *Quain*, *Bedford v. Warden of Sutton Coldfield*, 3 C. B. N. S. 449 (E. C. L. R. vol. 91), the distress was made on one property for the aggregate amount of a rent-charge due in separate sums from that and other properties. So, here, had the defendant distrained on the house and garden for rent due not only for the house and garden but also, separately, for the close, he would have been clearly wrong, and could not have remedied the error by avowry. That however is not the present case. The defendant took goods on each close for rent in arrear for each close respectively on which the goods were taken. His avowries state the matter according to the actual fact; and all that the plea in bar sets up in answer is that, at the time of the distress, the defendant said that he took it as a joint distress for one aggregate rent. That however, if true, is no answer at all.

CROMPTON, J.—The plaintiff, by the declaration, complains that the defendant took certain goods of his in closes A. and B. To this the defendant avows that he took the goods in A. as a distress for rent due to him for A., and the goods in B. as a distress for rent due to him for B. The plaintiff answers, in effect, by the plea *in
*810] bar: "You did in fact what you allege in the avowries; but in form you made one joint distress for the two rents." The plea, therefore, admitting that the defendant was justified in taking the goods, raises the question whether he deprived himself of his justification because he chose to say that he took them as a joint distress. That is the old question, whether a man can distrain for one cause and avow for another. It is settled law that he can, and that a wrong distress may be cured by a right avowry. If the plaintiff disputes the facts stated in the avowries, he should have traversed them. Upon the pleadings as they stand, he admits that the distress, though wrong in form, was right in substance.

(HILL, J., was absent.)

BLACKBURN, J.—The avowries are perfectly good as they stand. [His Lordship read them.] The plaintiff's plea in bar to them admits, in effect, that there was, as stated in the avowries, rent in arrear in respect of each of the separate demises, but objects that the defendant did not make a separate and distinct distress upon the one close for the rent in arrear for it, and also a separate and distinct distress upon the other close for the rent in arrear for it, but made and took one joint distress for the several arrears. This raises the question whether, the defendant having full right and power to distrain on the goods in each close as he did, the whole proceeding was nevertheless invalidated because he, at the time of distraining, declared a reason different from the proper one, and, probably, at that time thought the reason given to be the true and sufficient reason. The authorities are
*811] clearly against such a proposition. Lord Holt, *for instance, in *Grenville v. The College of Physicians*, 12 Mod. 386, says,

"If one distrain for an unjustifiable cause, yet, when he comes to avow, he need not insist on the cause for which he had distrained, but may justify for any lawful cause." The authorities cited *contra* by Mr. *Quain* do not touch the point. In *Rogers v. Birkmire*, Ca. temp. Hardw. 245, s. c. 2 Str. 1040, the present question was not raised; all that was decided being that the taking of goods on one set of demised premises as and for a distress for rent in arrear in respect of other premises separately demised, cannot (as it clearly cannot) be justified. *Bedford v. Warden of Sutton Coldfield*, 3 C. B. N. S. 449 (E. C. L. R. vol. 91), was not an action of trespass; and was a case stated without pleadings. The question there was whether, it turning out that the plaintiff was not the person from whom all the rent for which the defendant had distrained and levied upon him was due, the fact that the plaintiff owed only a part of the rent gave him a right of action against the defendant. The Court of Common Pleas held, very properly, that the action was maintainable. But the decision was not that the distress was illegal altogether, and really does not touch the present case.

Judgment for the defendant.

***WARD and Another v. The SOUTH-EASTERN Railway Company. May 1. [*812]**

By the Acts of Parliament incorporating and regulating defendants, a railway Company, they were required to keep a register of the proprietors of stock in the Company; each proprietor was empowered to transfer his stock by a prescribed form of transfer, executed by the transferor and the transferee; and each transfer was to be registered by defendants, the transferee to take no interest until such registration.

A judgment obtained by defendants against one Mary Anne Irving, a widow, in May, 1857, being still unsatisfied, she in the following October furnished a married woman, named Dunlop, with money to buy stock for her in defendants' Company. On 14th October, Dunlop bought the stock, and took and signed a transfer of it, which was in due form, in the name of Ann Watson, widow. Defendants registered this transfer, and transferred the stock into that name. On 29th August, 1858, Dunlop, by Irving's directions, resold the stock in the name of Watson. Plaintiffs then purchased it *bonâ fide*, and in the belief that Dunlop's name was Watson, and that she was a widow. A formal transfer from Dunlop, by that name and description, to plaintiffs was, on 10th September, 1858, registered by defendants, and the stock transferred into plaintiffs' names. Dunlop paid over to Irving the money received from plaintiffs for the stock. Both in the original purchase and in the resale, Dunlop acted without her husband's knowledge or intervention, and in collusion with and for the sole benefit of Irving, in order to prevent defendants from satisfying their judgment. Defendants believed both transactions to be *bonâ fide*, and that Dunlop was the person whom she represented herself to be. On 6th September, 1858, Irving, who had not then received from Dunlop the money paid by plaintiffs for the stock, petitioned the Insolvent Court, and the next day that Court made a vesting order. On 17th September, 1858, defendants first discovered the real state of facts. On 21st October, 1858, they cancelled the entry in their books of the transfer of the stock to plaintiffs, and transferred the stock into the name of Irving's assignee appointed by the Insolvent Court. Thereupon plaintiffs brought this action, in which they claimed a *mandamus* to defendants to register the transfer to them, and to enter their names as proprietors of the stock.

On a case stated, after writ and without pleadings, setting out the above facts: held, that plaintiffs were entitled to be replaced on the register, no fraud on their part being shown, and they having a title (whether legal or merely equitable was immaterial) to the stock. That their names, having been once placed by defendants on the register, were not removable therefrom at the mere will of defendants, but only on proof (of which there was none) of a better title in some other person.

CASE stated by consent and by order of Crompton, J. after writ and without pleadings.

The writ of summons was endorsed with a notice of claim for a mandamus, under The Common Law Procedure Act, 1854, sect. 68, to the defendants, "to cause an entry to be made in the book of the" defendants' *Company "kept for that purpose, of a transfer *813] to the plaintiffs of 600*l.* consolidated stock of the said Company, being part of 900*l.* consolidated stock now or lately standing in the name of Anne Watson in the books of the said Company; and to cause the names of the plaintiffs to be entered in the register book of proprietors of consolidated stock in the said Company as the proprietors of 600*l.* consolidated stock in the said Company; and to cause a certificate or ticket, with the common seal of the said Company affixed thereto, to be delivered to the plaintiffs, specifying the consolidated stock to which the plaintiffs are entitled in the said Company."

The defendants are incorporated by the name of The South-Eastern Railway Company by stat. 6 & 7 W. 4, c. lxxv., (a) and by that statute and also by stat. 6 & 7 Vict. c. li., (b) the affairs of the Company are regulated. Copies of these statutes respectively were to be taken as part of the case; and the attention of the Court was principally directed to the 109th, 110th, 111th, 112th, 118th, 119th, and 120th sections of the first-mentioned statute, and to the 30th, 31st, 32d, 33d, 34th, and 35th sections of the statute secondly mentioned. Of these, it is deemed sufficient to set out the substance of the following sections alone.

By stat 6 & 7 W. 4, c. lxxv., s. 109, the names of the proprietors in the Company are from time to time to be entered in a book, and a certificate, under the seal of the Company, is to be delivered to each *814] proprietor, on *demand, specifying the share or shares to which he is entitled, on payment of 2*s.* 6*d.*; and such certificate is to be admitted in all Courts as *prima facie* evidence of title.

By sect. 120, the proprietors of shares in the undertaking, their executors, &c., are empowered "to sell and dispose of any shares to which they shall be entitled, subject to the rules and conditions herein mentioned, and the form of conveyance shall be by writing, duly stamped, and may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require (that is to say): 'I, A. B., of , in consideration of the sum of paid to me by C. D. of , do hereby assign and transfer to the said C. D. share , numbered of and in The South-Eastern Railway Company, to hold to the said C. D., his executors, &c., subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said C. D., do hereby agree to accept and take the said share , subject to the conditions aforesaid. As witness our hands and seals the day of . ' And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the Company, or by some secretary or clerk of the Company, who shall enter in some book to be kept for

(a) Local and personal, public. "An Act for making a railway from The London and Croydon Railway to Dover, to be called The South-Eastern Railway."

(b) Local and personal, public. "An Act to enable The South-Eastern Railway Company to extend the line of their railway into the town of Dover; and to confer other powers and privileges on the said Company."

the purpose a memorial of such transfer and sale, and endorse the entry of such memorial on the deed of sale or transfer, for which entry and endorsement 2s. 6d. and no more shall be paid to the Company; and the Company, or some secretary or clerk as aforesaid, is hereby required to make such entry or memorial accordingly; and, on demand, to make an endorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the *purchaser for his security, for which endorsement no more [*815 than 2s. 6d. shall be paid; and such endorsement being signed by such secretary or clerk, shall be considered in every respect the same as a new certificate; and until such memorial shall have been made and entered as before directed, the seller thereof shall remain and be held liable for all future calls, and the purchaser shall have no part or share of the profits of the undertaking, nor any interest in respect of such share paid to him, nor any vote in respect thereof as a proprietor in the undertaking."

Stat. 6 & 7 Vict. c. li., s. 32, empowers the Company to consolidate shares. Sect. 33 enables the proprietors of the consolidated stock to transfer it in the same manner and subject to the same regulations as former shares might have been transferred under the former Act. By sect. 34, "The form of transfer of shares in the consolidated stock may be in the following words, or to the like effect (that is to say): 'I, A. B., of , in consideration of the sum of £ paid to me by C. D. of , do hereby transfer to the said C. D. £ consolidated stock of and in The South-Eastern Railway Company, standing in my name in the books of the Company (or part of the stock standing in my name in the books of the Company), to hold unto the said C. D., his executors, &c., subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said C. D., do hereby agree to accept and take the said stock subject to the conditions aforesaid. As witness our hands the day of .'"

Sect. 35 enacts that "The Company shall, from time to time, after consolidation, cause the names of the several parties interested in the consolidated stock, with the amount of interest therein possessed by them respectively, to be entered in a book [*816 *to be kept for the purpose, and to be called The Register Book of Proprietors of Consolidated Stock, which book shall be accessible at all reasonable times to the several proprietors."

Pursuant to these enactments, or some of them, proper books are kept by the defendants wherein the transfers that are made from time to time of the stock and funds of the Company are registered, and entries and registers are made of the names and residences of the several persons who from time to time are deemed to be the owners and proprietors of such stock and funds; to whom certificates of such ownership and property are issued from time to time by the defendants, under the seal of the Company.

In the year 1857, an action was brought against the defendants by one Mary Ann Irving, of Manchester, widow, in the Court of Queen's Bench; which was tried at the Spring Assizes at Liverpool, in that year, when a verdict was found for the defendants. On 2d May, in the same year, the defendants obtained judgment against the said M. A. Irving, in the same action, for the sum of 392l. 3s., being the

amount of their costs of suit; but, in consequence of the concealment of the person and property of the said M. A. Irving, the defendants were wholly unable to obtain any benefit from their said judgment until 12th August, 1858, when the said M. A. Irving was arrested by the sheriff of Lancashire, and imprisoned in the gaol of Lancaster, under a writ of ca. sa., dated 5th October 1857, duly issued at the suit of the defendants in execution of their said judgment. During the period which elapsed between the obtaining of the said judgment by the defendants, and the said arrest of M. A. Irving, she was possessed of a sum of 556*l.*, which, in October, *1857, she placed *817] in the hands of one Anna Blackwood Dunlop, the wife of one Hugh Graham Dunlop, of Manchester, warehouseman, with instructions to purchase for her therewith such an amount of the stock of The South-Eastern Railway Company as could be procured for that sum. In pursuance of these instructions, the said A. B. Dunlop, on or shortly before 14th October, 1857, called upon one John Fildes, of Manchester, stock and share broker, to whom she was personally unknown, and, stating to him that her name was Ann Watson, and that she was a widow, residing at No. 14, Dorset Street, Hulme, Manchester, requested him to purchase 900*l.* consolidated stock of the said Company. Accordingly, on 14th October, 1857, Fildes purchased, as requested, 900*l.* consolidated stock of the South-Eastern Railway Company, and prepared the regular deed of transfer thereof, in order that the same might be executed by the said A. B. Dunlop, so representing herself, as aforesaid, as Ann Watson; and she was accordingly described in the said deed of transfer as Ann Watson, of No. 14, Dorset Street, Hulme, Manchester, widow. She then executed the said deed of transfer, by and in the name of Ann Watson; and she then paid to the said John Fildes the sum of 556*l.*, being the amount of the purchase-money of the said stock, in the same moneys she had received from the said Mary Ann Irving as aforesaid. On 21st October, 1857, the said 900*l.* consolidated stock of the said Company was transferred in the books of the Company into the name of Ann Watson, of Manchester, widow; and was so standing, and the name of Ann Watson, of Manchester, widow, appeared in the books of the Company, as the name and description of the proprietor thereof, at *818] the time of the said arrest and imprisonment of the *said M. A. Irving. The purchase of the said stock by the said A. B. Dunlop was made solely with the money and for the benefit and on the account of the said M. A. Irving, and the said A. B. Dunlop and M. A. Irving were therein acting in collusion together, with intent to prevent the defendants from recovering out of the said sum of 556*l.* their said judgment-debt. The original or maiden name of the said M. A. Irving was Watson. Both the said John Fildes and the defendants believed, at the time as well of the purchase as of the transfer of the stock, that the whole transaction was entirely bonâ fide, that the name of the said A. B. Dunlop was Ann Watson, and that she was a widow. The said H. G. Dunlop, the husband of the said A. B. Dunlop, was not in any way a party or privy to the acts of his wife, either in the purchase or in the transfer of the stock. Afterwards, the said A. B. Dunlop, still representing that her name was Ann Watson, and that she was a widow, requested the said John

Fildes to resell the said 900*l.* consolidated stock; and accordingly on or about 29th August, 1858, upon the Stock Exchange at Manchester, Fildes sold part of the stock, namely 600*l.* stock, to the plaintiffs, Benjamin Ward and David Nelson, and the residue of the said 900*l.* stock, namely 300*l.* stock, to one John Lingard Ross. On 31st August, 1858, the said A. B. Dunlop, still representing that her name was Ann Watson, and that she was a widow, executed a deed of transfer of the said 600*l.* consolidated stock to the plaintiffs, and upon the same day she also executed a deed of transfer of the said 300*l.* consolidated stock to the said John Lingard Ross. Each of those deeds was executed by her in the name of Ann Watson, who was therein described as a widow. And thereupon the said John Fildes, still believing that the said representation and description of [*819] the said A. B. Dunlop were true, then delivered to her the sum of 644*l.* 7*s.* 6*d.*, being the proceeds of the sale of the 900*l.* consolidated stock. Of this sum of 644*l.* 7*s.* 6*d.* a portion was forthwith handed over by the said A. B. Dunlop to the said M. A. Irving, who then remained a prisoner as aforesaid in the gaol of Lancaster; and who, previously to her so receiving the said portion of the said sum of 644*l.* 7*s.* 6*d.*, that is to say, on 6th September, 1858, had petitioned the Court for the Relief of Insolvent Debtors for her discharge, and had also, on 7th September, 1858, filed her schedule, as directed by the statute in such case made and provided, without making any mention therein either of the said consolidated stock or of any of the transactions relating thereto, or of any money derived therefrom. The vesting order of the Insolvent Court, vesting the estate and effects of the said M. A. Irving in the provisional assignee of the Court, was made and bears date on 7th September, 1858. The residue of the said sum of 644*l.* 7*s.* 6*d.* was afterwards disposed of by the said A. B. Dunlop according to the directions of the said M. A. Irving. The deed of transfer of the 600*l.* consolidated stock to the plaintiffs, as the same had been executed by the said A. B. Dunlop in manner aforesaid, having been forwarded by the plaintiffs to the defendants for registration, was, on 10th September, 1858, received by the defendants, who thereupon registered the transfer, and transferred the said sum of 600*l.*, consolidated stock, from the name of Ann Watson, in which it was then standing in the books of the Company, to the names of the plaintiffs, who were entirely ignorant of any fraud or misrepresentation, and still believed that the whole transaction was valid and regular and bonâ fide. A certificate of [*820] proprietorship of the same stock was prepared by the defendants in the names of the plaintiffs, but has never been delivered to them or either of them. On 17th September, 1858, the defendants first became acquainted with the facts before stated, relative to the purchase of the said 900*l.*, consolidated stock, by the said A. B. Dunlop, and the subsequent sale thereof by her. And upon the hearing of the petition of the said M. A. Irving, at the County Court of Lancaster, on 24th September, 1858, the defendants appeared by counsel to oppose her discharge, when she admitted all the facts aforesaid to be true, but refused to state what she had done with the portion of the proceeds of the sale which had been handed to her, as aforesaid, by the said A. B. Dunlop, or what directions she had given to the said A. B.

Dunlop for the disposal of the residue thereof. Whereupon she was remanded to prison, and Mr. Robert Ivers Cox, of Greenwich, clerk to The South-Eastern Railway Company, was, by order of the Court, appointed assignee of her estate and effects, and he thereupon accepted the appointment, and signed a memorandum of such acceptance in the margin of the order; and, on 21st October, 1858, he delivered to the defendants a statutable declaration that, by virtue of such appointment and his acceptance thereof, "the sum of 900*l.* South-Eastern Railway Consolidated Stock, now standing in the name of Ann Watson, described as of 14, Dorset Street, Hulme, Manchester, widow," had "been passed to and" was "now vested in" him as the assignee of M. A. Irving. Whereupon the defendants cancelled the entries which had been made in their books, transferring the said sum of 600*l.* consolidated stock to the names of the plaintiffs; and they then *821] transferred in their books the whole of the 900*l.* consolidated *stock to the name of the said Robert Ivers Cox, as such assignee as aforesaid. The defendants had since been requested by the plaintiffs to register the transfer of 600*l.* consolidated stock of the Company to them, in the books of the Company, and to place the plaintiffs' names in the books of the Company as the registered proprietors of that stock; which the defendants wholly refused to do. A like request had also been made to the defendants, by John Liugard Ross, to register the transfer to him of the 300*l.* consolidated stock; which the defendants had met by a like refusal.

The question for the opinion of the Court was, Whether, under all the above circumstances, and having regard to the said two Acts of Parliament, and more especially to the sections thereof above referred to, the plaintiffs were entitled to maintain the action, and to compel the defendants to register the transfer so made to the plaintiffs as aforesaid, and to place their names in the books of the Company, as the registered proprietors of the said 600*l.* consolidated stock of the Company.

If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiffs for the amount of the dividends accrued due on the 600*l.* consolidated stock up to the time of the entry of the judgment, with taxed costs. And a writ of mandamus was to be issued, to the effect prayed by the endorsement on the writ of summons. But if the Court should be of opinion in the negative, judgment was to be entered for the defendants, with taxed costs.

Badeley, for the plaintiffs.—The question is, whether a person purchasing the stock of a Company, bonâ fide and for valuable consideration, at the market-price, *and in the ordinary manner, *822] is to lose it because of an antecedent fraud by the vendor upon the Company. No valid reason can be suggested why the vendee's title to the stock should be affected by such fraud, to which he was no party, and of which he knew nothing. [COCKBURN, C. J.—Mrs. Dunlop, of whom the plaintiffs bought the stock, was entered on the Company's register in a false name and as a widow; whereas, as it turns out, she was a married woman. As such, could she transfer any title to the plaintiffs?] It is too late for the Company to raise the question of title. They are estopped by their conduct in having put Mrs. Dunlop on the register as Mrs. Watson, and as a widow.

They were bound to make inquiry into the truth of her description of herself, before taking that step. By registering her as they did, they enabled her to sell the stock to the plaintiffs; and have, moreover, ratified that sale by registering the transfer from her to the plaintiffs. But, in fact, Mrs. Dunlop's husband never had any title to the stock; his wife having acted throughout the transaction as a mere agent for Mary Ann Irving. [BLACKBURN, J.—The wife could not make her husband a shareholder, without his authority.]

The Court here called upon *T. Jones* (Northern Circuit), contra.

T. Jones, for the defendants.—The plaintiffs have no title to the stock. The vesting order in Irving's insolvency was made on 7th September, 1858; but the transfer of the stock from Mrs. Dunlop, or Watson, to the plaintiffs was not registered by the defendants till the 10th of that month. At that date, therefore, Mrs. Dunlop, assuming her position to have been that of a *mere agent for Irving, [*823 had no longer authority to assign the stock, and the defendants are not estopped by their registration of the assignment. The principal point, however, upon which the defendants rely is, that Mrs. Dunlop, being a married woman, could transfer no interest whatever in the stock to the plaintiffs. The form of conveyance of shares given in stat. 6 & 7 W. 4, c. lxxv., s. 120, and that of transfer given in stat. 6 & 7 Vict. c. li., s. 34, both contemplate a transfer by a vendor who has a good title to make it, which a married woman cannot have. [COCKBURN, C. J.—Would not a Court of equity, under the circumstances in this case, compel Mr. Dunlop to join in perfecting the transfer to the plaintiffs, if his intervention is necessary to its validity? Moreover, assuming that the plaintiffs have only an equitable title, is it open to the defendants to question that title, after registering it?] If a Court of equity would interfere to perfect the plaintiffs' title, it would do so only subject to all the equities of the various parties. [CROMPTON, J.—I have always thought that a Company cannot alter or cancel the registration of a transfer of shares, when once made.] *Hare v. London and North Western Railway Company*, 8 Weekly Rep. 352, is a recent authority to the contrary. Suppose that a Company registers a forged transfer, can it be said that they may not rectify the mistake on discovering the forgery? They cannot be liable both to the original shareholder and to the transferee under the forgery, who has no title. [CROMPTON, J.—Did not the defendants, by registering the stock in the name of Ann Watson, widow, in effect make a representation that there was such a person, and that she was the proprietor, such *that a reasonable man would believe that it was meant that he should act [*824 upon it; and are they not, therefore, within the principle laid down in *Freeman v. Cooke*, 2 Exch. 654,† estopped from denying the truth of that representation, as against the plaintiffs, who have altered their position by acting upon it as true?] In putting the name of Ann Watson on the register, the defendants performed a mere ministerial act; and they by no means thereby warranted her title to the stock to be a good one. The sole object of registration is to settle the title of the person registered to be treated as a shareholder by the Company, and to receive dividends; not to warrant such person as a shareholder to strangers who afterwards purchase from him. More-

over, none but the legal owners of shares have a right to be on the register; and although the plaintiffs were once on it, their position is now the same as though they had never been so. In order to establish their claim to be re-registered, they must show that they purchased from the last legal owner. This they fail to do; for Mrs. Dunlop never acquired any legal title to the stock. Either she was, as a feme covert, under a disability to accept, in pursuance of stats. 6 & 7 W. 4, c. lxxv., s. 120, and 6 & 7 Vict. c. li., s. 34, the transfer to her from the holders of whom she bought, to the validity of which her husband's assent was requisite; or, if that transfer had any effect, it operated to vest the property in the stock in her husband, who alone had power to transfer it afterwards. All the authorities bear out the proposition in Com. Dig. tit. *Baron and Feme* (Q), that "generally a feme covert has no power to make a contract without

*825] her husband; and therefore such *contract is absolutely void." [COCKBURN, C. J.—Conceding all this, have not the plaintiffs, by being at one time put on the register, and so acknowledged by the Company as shareholders, acquired a vested right to remain on the register, even though they bought of a person not entitled to transfer; unless fraud on their part, or a better intervening title in some one else, is shown?] *Hare v. London and North Western Railway Company*, 8 Weekly Rep. 352, shows that the plaintiffs have no such right, having no legal interest in the stock. [COCKBURN, C. J.—According to your argument, the Company may apply the dividends of shares to their own use, in every instance in which they can ascertain that the registered proprietor has no legal title; and that, although no one else claims the shares adversely to him.] Stat. 6 & 7 W. 4, c. lxxv., s. 120, provides that no interest in shares shall pass to a purchaser till a memorial of the transfer and sale has been made and entered; and that entry must go for nothing if the transfer is invalid. [COCKBURN, C. J.—Surely the Company cannot be permitted to cancel the transfer *mero motu*, after they have registered it.] If not, it must follow that they are estopped from denying the title of any one who can contrive, by fraud or forgery, to get on the register.

COCKBURN, C. J.—I am of opinion that our judgment must be for the plaintiffs. We start with the fact that the plaintiffs were registered by the Company, the defendants, as shareholders. The question, therefore, which it is necessary to decide is, whether the Company, *826] having once registered a person as a shareholder, are *entitled *proprio motu* to strike him off the register. I am far from saying that there can be no cases in which this might lawfully be done; that it could not, for instance, be done in cases of fraud or forgery, and the like. But in the present case the plaintiffs had a good equitable right to have their names placed and retained upon the register, although their legal title may possibly be defective. Can, then, the Company, having chosen to put upon the register persons having a perfectly good equitable title to be there, afterwards of their own mere will and pleasure take those persons off it, on the simple ground that there is a flaw in their legal title? If so, it follows that, whenever the Company can pick a hole in the legal title of a shareholder, they may remove his name from the register, treat his shares as belonging to no one, and appropriate them and the dividends upon

them to their own use. The argument for the defendants must go to that extent, and, resulting as it does in such a monstrous proposition, cannot be supported. But, here, the Company have done more than remove the plaintiff's names; they have substituted for them the name of the assignee under Mary Ann Irving's insolvency. Now it is clear that she never had any but an equitable interest in the stock: and her assignee would have taken no greater interest than she had, even had she not parted with it before her insolvency. She had, however, before then, parted with it, and it had become vested in the plaintiffs; so that her assignee, at best, took an equity subsequent and subordinate to that of the plaintiffs. The Company, therefore, were clearly not justified in placing the name of the assignee on the register. Persons, as the plaintiffs, whose names are once on the register, have a right to have them retained there, unless the Company can show *a sufficient reason for taking them off; in order to which the Company must establish either that danger will arise to themselves from the retention, or that others have a better title, in law or in equity, to the shares, than the registered holders. In this case the Company has failed to show any such justification for their conduct. [*827]

CROMPTON, J.—I am of the same opinion. It is sufficient for us to say that the plaintiffs' names, having been put on the register, cannot be taken off unless the Company can show that some one else has a better title; and the Company has shown nothing of the sort. I do not mean to say that there may not be cases, cases of fraud for instance, in which a Company would be justified in removing the name of a proprietor from their register. Having regard, however, to the provisions of the present Company's Acts of Parliament, it is plain that a person who is once put on the register acquires thereby a status of proprietorship, from which he can be displaced only by some one who has a better title. If it were otherwise, the Company might oust a present proprietor by finding out a flaw in the title of a previous holder seven or eight years back. It is said for the defendants that Mrs. Dunlop, being a married woman, could not make a valid transfer of the stock to the plaintiffs. Whether she could or could not do so is a point open to question. Assuming, however, that she could not, still, the defendants, by registering the transfer from her, have acted as if she could; and I very much doubt whether they have not thereby estopped themselves from now setting up that she, as a married woman, could not transfer. That, however, it is unnecessary to *decide. The plaintiffs are sufficiently entitled to our judgment on the ground that they are in possession of the stock, [*828] have been registered as proprietors of it, and cannot be ousted from their proprietorship and struck off the register, except by some one who can show a better title; and that no such person has appeared.

(HILL, J., was absent.)

BLACKBURN, J.—I am of the same opinion. The stock, the subject of the present controversy, was, in October, 1857, transferred by the then holder to Ann Watson, and the transfer, which was, to all appearance, correct, was, in the same month, registered by the Company, the defendants. Ann Watson continued on the register till 10th September, 1858, when the Company registered a transfer in due form from her to the plaintiffs. On 17th September, 1858, the Com-

pany for the first time discovered that Ann Watson's real name was Dunlop, that she was a married woman, and that she had both purchased and resold the stock without her husband's knowledge or intervention, and as a trustee for one Mary Ann Irving. Thereupon they struck the plaintiffs' names off the register and substituted the name of Irving's assignee in insolvency, being a person who, at most, had but an equitable interest in the stock. Now, all that is necessary for us to decide, in this state of things, is, whether, after the plaintiffs had become possessed of the stock and had been formally registered as proprietors, the Company did not stand to them in a position analogous to that, for instance, of a tenant who has attorned to his landlord; *829] so as not to be justified in striking them off the register *on the ground that their title is bad, unless some one else comes forward and proves a title paramount. It appears to me that the Company are in that position. I do not wish to be taken as saying that the Company are absolutely estopped from disputing the plaintiff's title, so as to be liable to them as well as to any one who can show a title paramount. As to that I say nothing; it is sufficient for the purposes of my judgment, that in the present case no such title paramount has in fact been shown.

Judgment for the plaintiffs.

As to how far the registry of the North American Mining Co., 4 Mich. transfer of stock by a corporation will 465; Pollock v. National Bank, 3 Seld. estop it from questioning the title of N. Y. R. 274; Helm v. Swiggert, 12 claimants to it, see Mendlebaum v. Ind. 194.

The Churchwardens and Overseers of ALL SAINTS, POPLAR, Appellants, v. The Clerk of the Peace for MIDDLESEX, Respondent. *May 2.*

An order of justices, under stat. 16 & 17 Vict. c. 97, s. 93, obtained at the instance of the parish by which a pauper lunatic has been sent to an asylum, and adjudging him to be chargeable to the county in which he is found, on the ground that he is not settled in that parish, and that his parish of settlement cannot be ascertained, is an interim and not a final order. The county is, therefore, not estopped by submission to it from afterwards obtaining orders of justices under sect. 99, adjudging the pauper to be settled in the parish which obtained the first order, and requiring that parish to pay for his future maintenance.

CASE stated by consent and by Judge's order, under stat. 12 & 13 Vict. c. 45, s. 11.

William Baker, having become chargeable to the parish of All Saints, Poplar, in the county of Middlesex, was, on 5th November, 1839, sent, under an order of magistrates, to The Hanwell Lunatic Asylum, as a lunatic. His maintenance there was paid by the Poplar Union, on account of the said parish of All Saints, Poplar, which is included in *830] the said Union. This continued *until 27th October, 1851, when the said William Baker was, under an order of magistrates, removed to the Lunatic Asylum at Colney Hatch, in the said county of Middlesex. He there remained, at the expense of the parish of All Saints, Poplar until 16th October, 1858. Before 16th October,

1858, ten days' notice was given, by the overseers of the poor of the said parish of All Saints, Poplar, to the clerk of the peace of the said county of Middlesex, that the said overseers would, at the expiration of the said ten days, apply to the justices of the peace for the county of Middlesex for an order, under the statute in such case made and provided, adjudicating the said William Baker to be chargeable to the said county. On 16th October, 1858, the said overseers attended before the said last-mentioned justices and applied for the last-mentioned order; and J. W. Allen, attorney at law, attended on behalf of the said clerk of the peace and opposed the making of the order, on the ground that the last legal settlement of the said W. Baker was in the said parish of All Saints, Poplar. The said justices inquired into the matter and made an order, adjudicating the chargeability to the said county, under stat. 16 & 17 Vict. c. 97, s. 98. After the making of the said order, the treasurer of the said county paid to the guardians of the Poplar Union, on behalf of the said parish of All Saints, Poplar, the several sums of money mentioned in the said order. The said order has not been set aside or interfered with, unless the Court shall be of opinion that the order hereinafter mentioned interferes with it. On 8th February, 1859, the said clerk of the peace applied to two justices of the peace for the same county, and obtained from them, *ex parte*, an order adjudicating the settlement of the said W. *Baker in the said parish of All Saints, Poplar, under stat. 16 & 17 Vict. c. 97, s. 99. An order for [*831 the future maintenance of the said W. Baker, and for repayment to the said treasurer of the said moneys so paid under the order of 16th October, 1858, as aforesaid, was also then made under the said last-mentioned section. Notice of appeal was given, against these orders, to the General Quarter Sessions of the Peace for the county of Middlesex. On 16th October, 1858, when the order was made, the said W. Baker was settled in the parish of All Saints, Poplar, and from that day up to the present time the last legal settlement of the said W. Baker was and is in the said parish of All Saints, Poplar, under the same settlement.

The question for the opinion of the Court was, Whether, inasmuch as the order of 16th October, 1858, had not been set aside or interfered with on 8th February, 1859, the justices who made the orders of 8th February, 1859, had jurisdiction to make them. If the Court should answer this question in the negative, then the orders of 8th February, 1859, were to be quashed; if in the affirmative, then those orders were to be confirmed.

Poland, for the respondent.—The justices who made the orders of 8th February, 1859, had jurisdiction to make them. The question turns on the construction to be put upon stat. 16 & 17 Vict. c. 97, sects. 98 and 99. By sect. 98, "If any pauper lunatic be not settled in the parish by which" "he is sent to any Asylum," "and it cannot be ascertained in what parish" he "is settled," the overseers of the first-mentioned parish may give ten *days' notice to the clerk [*832 of the peace of the county in which such lunatic was found, to appear before two justices of that county, who may "inquire into the circumstances of the case, and" "adjudge" the "lunatic to be chargeable to such county," and order the treasurer of the county to

pay the expenses incurred in the matter. Sect. 99 enacts that "If, after any pauper lunatic has been sent to an Asylum," "and has been adjudged to be chargeable to a county, such county procure such lunatic to be adjudged to be settled in any parish, it shall be lawful for any two justices" "to make an order upon the guardians of the Union to which such parish belongs" "for payment to the treasurer of the said county of all expenses and moneys paid by such treasurer as hereinbefore is provided," and also for payment of the reasonable charges of the future maintenance of the lunatic. It should be observed that sect. 95 provides that "when any pauper lunatic is confined under the provisions of this Act he shall, for the purposes of this Act, be chargeable to the parish from which" "he has been sent, unless and until such parish shall have established, under the provisions herein contained, that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled." It will be contended by the other side that the order of 16th October, 1858, made under sect. 98, adjudicating the lunatic to be chargeable to the county of Middlesex, was a judgment between the parties binding for all time, and precluding the respondent from afterwards showing that the lunatic was settled in the appellant parish. That order, however, was merely an interim order, not determining where the pauper's *settlement was, but founded on *833] the fact that the parish of his settlement could not then be ascertained. *Wilson v. Overseers of Liverpool*, 17 Q. B. 303 (E. C. L. R. vol. 79), decided on the construction of similar enactments in the former Act, 8 & 9 Vict. c. 126, shows that no appeal lies against such an order. Sect. 108 of the present Act, giving an appeal to the Sessions to guardians and overseers against an order adjudging the settlement of a lunatic, could not be taken advantage of by a clerk of the peace, who is not there mentioned. It is reasonable to suppose that the Act gives him no appeal because the county is at liberty to procure another order, under sect. 99, adjudging the real settlement of the lunatic, as soon as that can be discovered.

(He was then stopped.)

Metcalf, contra.—The order of 16th October, 1858, having been made between the same parties as those between whom the orders of 8th February, 1859, were made, is binding and conclusive on them until it has been set aside. [COCKBURN, C. J.—One of the orders of February, 1859, has in effect set that of October, 1858, aside, by adjudicating the settlement of the lunatic to be in the appellant parish.] The second order was obtained *ex parte*, and ought not to bind the appellants.

COCKBURN, C. J.—Sect. 98 of the Act concludes with a proviso "that every county to which any pauper lunatic is adjudged to be chargeable as aforesaid may at any time thereafter inquire as to the parish in which such lunatic is settled, and may procure such lunatic *834] to *be adjudged to be settled in any parish." These words are quite wide enough to satisfy us that, notwithstanding an order has been made under that section, adjudging a pauper lunatic to be chargeable to a county, the county is not precluded from afterwards showing where the real settlement of the lunatic is. It is quite clear that the intention of the Legislature was that the county, though it

has submitted to such an order, may afterwards go before the magistrates for a second order to set the question of the lunatic's settlement right and relieve the county from further expense which ought not to fall upon it. This construction of the section is consistent with the general scope of the Act. I am of opinion, therefore, that the first order was only an interim order, and that the subsequent orders are good.

CROMPTON, J.—I am of the same opinion. It would be quite an exception to the general rules as to the adjudication of a pauper's settlement, were we to hold that an order of justices from which there is no appeal is final. It is quite clear to me, from the last proviso to sect. 98 of the Act, that the Legislature contemplated that an order such as that of 16th October, 1858, in the present case, should be interim only, and not final. Great inconvenience would arise, if a parish which knows nothing of the settlement of a lunatic pauper could, by obtaining an order making him chargeable to the county in which he then is, for ever preclude the county from showing that in reality his settlement is in that parish. The words and the spirit of the Act are equally against the construction which would lead to that result.

*HILL, J.—I also am of opinion that the justices had full jurisdiction to make the orders of 8th February, 1859. They [*835 clearly had, if we construe the concluding proviso in sect. 98 according to its plain and literal meaning; and we ought to do so unless we find something in some other part of the Act to lead us to infer that a different sense was intended. No such inference here arises; and we have this further reason for construing the proviso according to its plain meaning, that the order of 16th October, 1858, was one from which there was no appeal.

BLACKBURN, J.—I am of the same opinion. Had it been intended that an order such as that of 16th October, 1858, should be final and conclusive on the parties, if upheld, the Legislature would have given an appeal from it. The fact that no such appeal would lie tends strongly to show that the order is a mere interim order; and that view of it is confirmed by the plain and literal meaning of the last proviso to the 98th section.

Judgment for the respondent.

*The QUEEN v. BRADSHAW and Others, Justices of WARWICKSHIRE, and NEWSAM. May 5. [*836

If, at the hearing by justices of a summons against A. for non-payment of a poor-rate, it appears that the rate is good on its face and unappealed against, and that A. is actually the occupier of the rated property in the rating parish, the justices are bound to issue a distress-warrant to enforce the rate; and have no jurisdiction to inquire whether A.'s occupation is or is not beneficial, the nature of the occupation being ground only for appeal to the Quarter Sessions against the rate.

RIBTON had obtained a rule, under stat. 11 & 12 Vict. c. 44, s. 5, calling on John Johnson Bradshaw and two other justices of Warwickshire, and on Philip William Newsam, to show cause why the said justices should not issue a distress-warrant to levy on the goods

of Newsam 1*l.* 4*s.* 3*d.*, the amount assessed upon him by a poor-rate of 5th October, 1859, for the parish of Leamington Priors.

It appeared, from the affidavits on which the rule was obtained, that the rate was duly made and published on 5th October, 1859, and in it the executors of the Rev. Clement Newsam, deceased, were assessed at 1*l.* 4*s.* 3*d.*, in respect of a house, garden, and ground. No appeal had been made against this rate. The said Clement Newsam died in February, 1859, having, up to his death, been in the personal occupation of the house and ground. The defendant Newsam was one of the executors of the will of the deceased, and duly proved the will, and took possession of the premises and furniture. A considerable portion of the furniture was divided among the legatees, and the chief part of the rest was removed in July, 1859, when the house was advertised to be sold or let unfurnished. An old servant was left in the house to take care of it, and to show it to applicants, till the following November, when a sale of the remaining furniture took place, and the house was then *left without anybody in it. *837] This servant was, under the will, allowed the privilege of selecting certain pieces of the furniture which was left in the house which he did between May and November.

The defendant Newsam, having refused to pay the rate on demand was summoned before the justices, when it was objected, on his behalf, that, under the circumstances, he had no beneficial occupation of the premises; and the justices, being of that opinion, refused to issue a distress-warrant.

Hayes, Serjt., now showed cause.—The justices had jurisdiction to entertain the question whether Newsam was rateable as a beneficial occupier or not: and this Court will not, therefore, review their decision. Assuming that Newsam was not a beneficial occupier, the rate, as against him, was null and void, and might be shown to be so, even if the Sessions had confirmed it on appeal: *Milward v. Caffin*, 2 W. Bl. 1330. [CROMPTON, J.—There, the plaintiff had been rated for lands not in his occupation at all. Here, as in *Marshall v. Pitman*, 9 Bing. 595 (E. C. L. R. vol. 23), the party rated was, *primâ facie*, rateable as the occupier in fact of the premises in respect of which he was assessed; and that case shows that his only remedy is by appeal to the Quarter Sessions against the rate.] If Newsam was not a beneficial occupier he was not rateable, and the rate was, as against him, equally invalid as though he had not been an occupier at all. An appeal to the Quarter Sessions is proper with respect to the quantum of, or any overcharge in, a rate; but a person upon whom *838] it ought never to have been imposed is not, if *aggrieved by its enforcement, restricted to the remedy by appeal: *Governors of Bristol Poor v. Wait*, 1 A. & E. 264 (E. C. L. R. vol. 28). In 1. *Nolan's Poor Laws*, 256 (ed. 4), it is distinctly laid down that a person summoned before magistrates for non-payment of a poor-rate may urge in defence, *inter alia*, "that he is not liable to the rate, either as not being the occupier at all, or not being a rateable occupier," and *Lord Amherst v. Lord Sommers*, 2 T. R. 372, is cited in support of that proposition. [HILL, J.—That decision proceeded upon the ground that stables rented by the plaintiff, the colonel of a regiment, by order of the Crown and for the use of the regiment, were in the

occupation, not of the plaintiff, but of the Crown. The case would have been in point if the present rate had been imposed on the servant whom Newsam left in the house to take care of it.] In *Rex v. Morgan*, 2 A. & E. 618, note (a) (E. C. L. R. vol. 29), this Court refused a mandamus to justices to grant a distress-warrant to enforce a poor-rate, where the justices had heard and exercised their judgment, upon an application for the warrant, against the rateability of the person summoned; it being doubtful whether he was properly rated as a beneficial occupier. *Rex v. Benn*, 6 T. R. 198, shows that in issuing the warrant the magistrates perform a judicial act, which must be preceded by a summons and a hearing. The magistrates may be ruled to hear and determine such a summons, but, when they have once heard and determined, this Court will not interfere with the exercise of their discretion and call on them to decide differently. [COCKBURN, C. J.—*Marshall v. Pitman*, 9 Bing. 595 (E. C. L. R. vol. 23), and *Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), *are strongly against you. The latter of [*839 those cases shows that, as soon as land is shown to be in a parish and A. B. to be the occupier, the case is *prima facie* brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches; and that whether that *prima facie* case can be answered by any circumstances affecting the character of the occupation, is matter to be determined by the Court of Appeal on appeal made. It is competent to the magistrates to entertain the question of actual occupation; but that of beneficial occupation is matter for the Sessions only, on appeal.] *Rex v. Morgan*, 2 A. & E. 618, note (a) (E. C. L. R. vol. 29), is an authority that the magistrates may entertain the latter question; and, if they have jurisdiction to do so, this Court will not review their decision: *Reg. v. Paynter*, 7 E. & B. 328 (E. C. L. R. vol. 90), *Reg. v. Dayman*, 7 E. & B. 672.

Ribton, *contra*, was not heard.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. Although there appears to be some conflict between the authorities, the last decision, *Churchwardens of Birmingham v. Shaw*, 10 Q. B. 868 (E. C. L. R. vol. 59), which entirely confirms *Marshall v. Pitman*, 9 Bing. 595 (E. C. L. R. vol. 23), establishes the principle that where there is a visible occupation of property within the rating parish, and the party rated objects that, although he is in the visible occupation of the premises, such occupation is altogether devoid of benefit to him, he must seek his remedy by an appeal against the rate to the Quarter Sessions, and cannot, when before the *magis- [*840 trates in petty sessions, avail himself of that which is matter of appeal alone. The distinction is very obvious. It is quite true that the parish authorities have no power to rate a man who is not an occupier in the parish; who does not possess, or, possessing, does not occupy, any property there, as is the case, for instance, when the owner of a house locks the door and goes away, leaving the house altogether untenanted; and a person rated, under such circumstances, may, when brought before the magistrates, rely on such facts as showing that a distress-warrant to enforce the rate ought not to issue against him. On the other hand, if there is some occupation in fact, though not of a beneficial nature, the non-beneficial nature of the

The action had been brought to recover the value of a bale of canvas, which had been consigned to the defendants, at their station at Gloucester, to be carried to their station at Farringdon Road.

The declaration stated that the plaintiff sued the defendants "For that the defendants were common carriers of goods for hire upon and along The Great Western Railway from Gloucester to Farringdon Road, and the plaintiff, at the request of the defendants, caused to be delivered to them as such carriers, and they accepted and received, certain goods, to wit, fifteen bales of canvas, of the plaintiff, to be taken care of and safely and securely carried and conveyed by the defendants, as such carriers, upon and along the said railway from Gloucester to Farringdon Road aforesaid; and there, within a reasonable time in that behalf, to be safely and securely delivered by the defendants to the plaintiff for reward to the defendants in that behalf: yet the defendants, not regarding their duty in that behalf, did

*845] *not take care of the said goods, or safely or securely convey the same from Gloucester to Farringdon Road, nor there within a reasonable time, or at any time, safely or securely deliver the same to or for the plaintiff, although a reasonable time for such delivery had elapsed before the commencement of this action; but so carelessly and negligently conducted themselves with respect to the said goods, that, by reason of their negligence and carelessness, one bale of the said goods, containing canvas covers and rick cloths, became and was and is wholly lost to the plaintiff. And the plaintiff claims 50l."

The defendants suffered judgment by default, and on a writ of inquiry a verdict was found for the plaintiff for 11l. 5s., the value of the bale of canvas lost.

The defendants took out a summons calling on the plaintiff to show cause why he should not be deprived of his costs by a suggestion on the roll or otherwise, and why, on payment of 11l. 5s., without costs, by the defendants, all further proceedings should not be stayed. The summons was heard by Blackburn, J., and the question was then raised before him whether the action was not an action of contract, within stat. 19 & 20 Vict. c. 108, s. 30. The learned Judge referred the matter to the Court; and it was agreed, at his suggestion, that the plaintiff's costs should be taxed, subject to the present motion: which was accordingly done.

Macnamara now showed cause.—The original County Court Act, 9 & 10 Vict. c. 95, s. 129, deprived of costs a plaintiff bringing an action in a superior Court, if a verdict was found for him "for a sum less than 20l., if the said action is founded on contract, or less than *846] 5l. if *it be founded on tort." The subsequent Act, 13 & 14 Vict. c. 61, s. 11, deprives a plaintiff of costs "if in any action" brought in a superior Court "in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage," he "shall recover a sum not exceeding 20l., or if in any" such action "in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction," he "shall recover a sum not exceeding 5l.," "except in the case of a judgment by default." This Act differs from the former in enumerating the particular forms of action; the former having referred.

in general terms only, to actions "founded on contract" or "founded on tort." Then stat. 19 & 20 Vict. c. 108, s. 30, enacts that "where an action of contract is brought in" a superior Court, "to recover a sum not exceeding 20*l.*, and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs" unless by order of the Court or a Judge. This enactment having, with regard to actions of contract, done away with the exception in a plaintiff's favour, in the case of a judgment by default, contained in stat. 13 & 14 Vict. c. 61, s. 11, the question in the present case, the defendants having suffered judgment by default, is, whether the action is one of contract within stat. 19 & 20 Vict. c. 108, s. 30; whether, that is, having reference to the different classes of actions mentioned in stat. 13 & 14 Vict. c. 61, s. 11, it is an action of debt or assumpsit, as distinguished from an action on the case. The answer is that the action is not one of debt or assumpsit, but an action on the case, founded on the tort of the defendants in neglecting the duty imposed on them, as common carriers, by the custom of the *realm. The other side will rely on *Legge v. Tucker*, 1 H. & N. 500;† but that was an [*847 action against a livery-stable keeper for not taking care of a horse by keeping it in a separate stable; and was properly held to be an action of contract, on the ground that, to make the defendant liable, it was necessary to prove an express contract by him so to keep the horse. The Court declared the test to be whether the action could be maintained without proof of a contract; and recognised the distinction between actions on special contracts and actions founded on a general duty imposed by the custom of the realm. In 1 Williams's *Saunders*, 291 f, note (g), it is laid down that "where the action is maintainable for the *tort* simply without reference to any contract made between the parties, no advantage can be taken of the omission of some defendants, or of the joinder of too many, as for instance in actions against carriers, which are grounded on the custom of the realm." Bretherton v. Wood, 3 B. & B. 54 (E. C. L. R. vol. 7), is cited as the chief authority for this proposition. That was a case in which the plaintiff sued ten defendants, as proprietors of a stage coach for the conveyance of passengers for hire (which the Court construed to mean common carriers), for that they received the plaintiff to be safely carried for hire from A. to B., and by reason thereof ought to have safely carried him; but that they, not regarding their duty, conducted themselves so carelessly in that behalf that the plaintiff, by their carelessness, while being so conveyed, was injured. It was held that the action was founded, not on contract, but on the breach of a duty imposed on the defendants by the custom or common law of England; and that *therefore a verdict against eight of the ten, the other two [*848 being found not guilty, was good. The common law duty of a carrier is to carry safely and securely; and is paramount to and independent of his liability under the particular contract of carriage which he may make. [COCKBURN, C. J.—Does not the duty arise as soon as the contract is made, and is it not dependent on a contract being made, and engrafted by the common law on the contract when made?] It is a duty independent of, and which overrides, the contract, which is per se one of mere bailment. In *Pozzi v. Shipton*, 8 A. & E. 963 (E. C. L. R. vol. 35) the declaration was similar to that

in the present case, except that it contained no positive averment that the defendants were common carriers, and was therefore consistent with the defendants being common carriers, or being hired on the particular occasion only. On the trial the plaintiff gave no proof of an express contract, but endeavoured to show that the defendants were common carriers. No objection was taken to the course of the evidence, and the case was proved as to one defendant only, who was shown to be a common carrier, and a verdict was taken against him and for the other defendant. On motion to enter a nonsuit, on the ground that the action was founded on contract, and therefore a verdict could not pass against one defendant only, the Court held that the declaration might, and therefore must, after verdict, be read as a declaration against carriers on the custom of the realm, and consequently that the verdict was maintainable. So, in *Marshall v. York, Newcastle and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. *849] vol. 73), an action by a servant, travelling with his master on a railway, against the railway Company for the loss of his luggage, was held to be maintainable, though the master took and paid for the plaintiff's ticket, and it was urged by the Company that the only contract by them was with the master. Jervis, C. J., in giving judgment, after observing that it was conceded that if, under the same circumstances, the plaintiff had sustained the loss of a limb, or any other personal injury, he alone could have sued, says, (a) "Upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any *contract* between him and the Company, but by reason of a duty implied by law to carry him safely." "But, if the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; for the duty would equally arise, though the payment was by a stranger." And Williams, J., says, (b) "The case was, I think, put upon the right footing by Mr. Hill, when he said that the question turned upon the inquiry whether it was necessary to show a contract between the plaintiff and the railway Company. His proposition was, that this declaration could only be sustained by proof of a contract to carry the plaintiff and his luggage for hire and reward to be paid by the plaintiff, and that the traverse of that part of the declaration involves a traverse of the payment by the plaintiff. I am of opinion that there is no foundation for that proposition. It seems to me that the whole current of authorities" "establishes that an action of this sort is, in substance, not an action of contract, but an action of *tort* against the Company, as carriers." *850] "It seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary." From these authorities it is clear that the present is an action of tort and not of contract.

Digby, contra.—Forms of action being now abolished, too great stress is not to be laid on the mention of particular actions in stat. 13 & 14 Vict. c. 61, s. 11, which is, in substance, a mere re-enactment of stat. 9 & 10 Vict. c. 95, s. 129, with the addition of doing away with the necessity for a suggestion to deprive the plaintiff of costs. The effect of stat. 19 & 20 Vict. c. 108, s. 30, upon which the whole ques-

(a) At page 662.

(b) At page 663.

tion turns, is to place judgments by default, in actions of contract brought in the superior Courts to recover a sum not exceeding 20*l.*, on the same footing, with respect to costs, as judgments obtained by verdict. The present action is, in substance, one of contract, though the declaration may, perhaps, be regarded as framed in tort. The cases cited on the other side are decisions on questions of non-joinder and pleas in abatement, and turned on matters of form which are not conclusive of the present case. In *Powell v. Layton*, 2 New Rep. 365, 370, Sir James Mansfield, C. J., says, "I suppose there can be no doubt, and indeed it is so stated by Lord Mansfield in *Hambly v. Trott*, Cowp. 375, that if a common carrier accept goods to carry and then die, an action will lie against his executor. How is that? Why, because the action is founded on contract. Indeed Lord Mansfield says it must not be an action on the custom of the *realm, [*851 which would be in tort; but it must be an action of contract. But the form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract, and the circumstance of an action lying against the executor of the carrier shows that it is contract. How an action against a carrier on the custom ever came to be considered an action in tort I do not understand, but it is so considered, and a count in trover is joined with it; and yet, though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract. In *Dale v. Hall*, 1 Wils. 282, Mr. Justice Denison considers the action against the carrier as founded in contract, and that the circumstance of the *suscepit* being omitted or introduced into the declaration makes no difference." *Legge v. Tucker*, 1 H. & N. 500,† is directly in point for the defendants. In *Buddle v. Willson*, 6 T. R. 369, the defendant was in form charged in tort for neglect of duty as a common carrier, and pleaded in abatement the non-joinder of his partners; and the Court thought that such a plea, if pleaded in time, would have been good, the cause of action arising quasi ex contractu. In *Pozzi v. Shipton*, 8 A. & E. 963 (E. C. L. R. vol. 35), the Court made every intendment in the plaintiff's favour, because the question arose after verdict. *Courtenay v. Earle*, 10 C. B. 73 (E. C. L. R. vol. 70), is a recent decision that an action in reality one of *assumpsit* cannot be made one of tort by any ingenuity in shaping the declaration; for that the substance and not the form is to be regarded. [CROMPTON, J.—The third and fourth counts, in that case, would have disclosed no cause of action whatever, if the *words [*852 relating to contract had been struck out of them.] In *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. vol. 73), the defendants' liability to the plaintiff arose from the fact that he and his luggage were lawfully in the train with the consent of the defendants; thereby a duty to take care of the luggage was imposed on the defendants, for the breach of which they were liable to the plaintiff, with whom they had made no contract, in an action of tort only. *Bretherton v. Wood*, 3 B. & B. 54 (E. C. L. R. vol. 7), was a case not of mere negligence but of positive misfeasance. [HILL, J., referred to *Corbett v. Packington*, 6 B. & C. 268 (E. C. L. R. vol. 13).]

COCKBURN, C. J.—I am of opinion that this rule must be discharged.

I own I regret that the law should remain in a somewhat anomalous position on this question; and that, as in this particular case, a party who has an option to sue either for a breach of contract or for a violation of duty, should get his costs or lose them according as he has framed his declaration in the one way or in the other. It would have been better if the Legislature had more clearly indicated their intention; but it is not our province to legislate for them. The statute deprives a plaintiff of costs, in the event of a judgment by default, where an action of contract is brought in a superior Court to recover a sum not exceeding 20*l*. The question therefore is, whether the present is an action of contract or on the case. Now, whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to refer to the cases to which our attention *853] has been called, *without seeing that they establish that a duty was imposed upon the defendants in the present case, by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract; but he was also entitled to sue the defendants for the breach of their common law duty. Having chosen the latter course, he cannot, according to the authorities, be said to have brought an action of contract; although, therefore, he has recovered less than 20*l*. by a judgment by default, he is not deprived of his costs by stat. 19 & 20 Vict. c. 108, s. 30. The action is an action on the case not in form only but in substance.

CROMPTON, J.—I am of the same opinion. When enacting stat. 13 & 14 Vict. c. 61, s. 11, the Legislature appears to have thought that it was necessary to specify the different kinds of actions of contract and of tort respectively; “covenant, debt, detinue, or assumpsit” being mentioned on the one hand, and “trespass, trover, or case” on the other. That enactment contains an exception of the case of a judgment by default; an exception which is taken away, as regards actions of contract, by stat. 19 & 20 Vict. c. 108, s. 30; which, however, curiously enough, leaves untouched the case of a judgment by default in actions of tort. It follows that a plaintiff who obtains judgment by default in an action on the case, though for the very smallest amount, is still entitled to his costs. It is said, for the defendants, that the present is substantially an action of contract and not on the case. But ever since *Pozzi v. Shipton*, 8 A. & E. 963 (E. C. L. R. vol. 35), *854] it has *been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common law duty to carry safely, independently of the particular contract which he makes. *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. vol. 73), is a recent decision to that effect. It is, therefore, impossible for us to say that the present is an action of contract within the meaning of stat. 19 & 20 Vict. c. 108, s. 30.

HILL, J.—I am entirely of the same opinion. The Legislature seems designedly, in stat. 13 & 14 Vict. c. 61, s. 11, to have used more precise language than in stat. 9 & 10 Vict. c. 95, s. 129; giving in the later statute the well-known names of the different forms of action,

"covenant, debt, detinue, or assumpsit," "trespass, trover, or case," instead of, as in the earlier, making general reference to an "action" "founded on contract" or "founded on tort." Is, then, the present an action on the case, or an action of assumpsit? *Pozzi v. Shipton*, 8 A. & E. 963 (E. C. L. R. vol. 35), and *Marshall v. York, Newcastle, and Berwick Railway Company*, 11 C. B. 655 (E. C. L. R. vol. 73), are distinct authorities that it is the former, and therefore not an action of contract within stat. 19 & 20 Vict. c. 108, s. 30

BLACKBURN, J.—I am of the same opinion. [His Lordship read stats. 9 & 10 Vict. c. 95, s. 129, 13 & 14 Vict. c. 61, s. 11, and 19 & 20 Vict. c. 108, s. 30.] The question is, is this an action of contract or on the case? *Marshall v. York, Newcastle, and Berwick Railway Company* is a distinct decision that it is in substance, no *less [*855 than in form, an action on the case. The defendants there were held liable to the plaintiff, a servant travelling on their line with his master, who paid his fare, for the loss of his luggage; although not only was the declaration not framed on a contract, but there was no contract with the plaintiff on which it could have been framed. That is a conclusive authority that a common carrier is liable to an action for a breach of the duty imposed on him by the custom of the realm, apart from any considerations of contract. The present is an action of that description, and not of contract. Rule discharged.

SCHLUMBERGER v. LISTER. *May 7.*

A party to an action in a Court of common law will not be allowed to plead therein, on equitable grounds, facts which he has, pending the action, set up in a Court of equity as entitling him to relief, in proceedings instituted there with reference to the subject-matter of the action.

THE declaration stated that Josué Heilmann was the true and first inventor of certain improvements in certain machines for preparing to be spun cotton, wool, and other fibrous materials; that letters patent were granted to him for the same; that afterwards and before suit, and before the committing by defendant of the grievances therein after mentioned, all the interest, right, title, and benefit of and in the said invention, and of the privileges granted and secured by the said letters patent, by divers mesne assignments came to and vested in and still was vested in plaintiff and thenceforth had always been exercised and enjoyed by plaintiff, by himself, his deputies, servants, and agents in that behalf; yet that defendant, well knowing the premises, wrongfully, unlawfully, and unjustly, without the leave, license, or *agreement of plaintiff or of any other person or persons law- [*856 fully entitled to grant such leave or license or to make such agreement, and against the will of plaintiff, made and sold, to wit, 1000 machines, in imitation of the said invention.

Second breach. That defendant, well knowing the premises, wrongfully and unjustly, without such leave, license, or agreement as aforesaid, and against the will of plaintiff, imitated in part, and made and procured to be made, divers, to wit, 1000 machines, in imitation of parts of the said invention.

Third breach. That defendant, well knowing the premises, wrongfully and unjustly, without such leave, license, or agreement, as aforesaid, and against the will of plaintiff, made, used, exercised, and put in practice the said invention, and divers to wit all the parts thereof.

Fourth breach. That defendant, well knowing the premises, wrongfully and unjustly, without such leave, license, or agreement, as aforesaid, and against the will of plaintiff, counterfeited and imitated and did use and put in practice the said invention.

Fifth breach. That defendant, well knowing the several premises, wrongfully and unjustly, without such leave, license, or agreement, as aforesaid, and against the will of plaintiff, did counterfeit and imitate in part the said invention, and did use and put in practice in part the said invention.

By reason whereof plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived and acquired from the said invention and letters patent.

*857] Pleas. 1. Not guilty. 2. That, before the *committing by defendant of the grievances complained of, all the interest, right, title, and benefit, of and in the said invention, &c., did not come to and vest in plaintiff as alleged. 3. That defendant did not commit the said grievances while the said interest, &c., were vested in plaintiff. 4. That the said Josué Heilmann, while the said letters patent and patent rights were vested in him, died intestate, and that afterwards letters of administration of his estate and effects were duly granted to Jean Jacques Heilmann; that the said Jean Jacques Heilmann afterwards, and while the said letters patent and patent right were vested in him as such administrator, absolutely and irrevocably granted by deed, for good and valuable consideration, to Titus Salt, Edward Akroyd, and Henry Akroyd, their executors, administrators, and assigns, and to such person or persons as the said Titus Salt, Edward Akroyd, and Henry Akroyd, or the survivors or survivor of them, or the executors or administrators of such survivor, or his assigns, should from time to time license empower, or authorize in that behalf, full and free, and, except as thereafter mentioned, exclusive liberty and license, in accordance with and to the full extent of the exclusive rights and privileges granted to the said Josué Heilmann by the said letters patent, to make, use, exercise, and vend the said invention, so far only as the same invention in any way related to the preparing to be spun all kinds of animal wool and hair, but not further or otherwise, throughout all and every or any part or parts of England, Wales, Berwick-upon-Tweed, Scotland, and Ireland, in exclusion of the said Jean Jacques Heilmann, his executors and administrators, and any person or persons claiming under him or them or *858] under the said Josué Heilmann, deceased; to be had, *used, exercised, and enjoyed by the grantees, their executors, administrators, assigns, and sub-licensees, for their own use and benefit. That afterwards, while the said Titus Salt, Edward Akroyd, and Henry Akroyd, were entitled to all the liberty, license and authority, rights and privileges, granted to them by the said deed, and before the committing of the grievances complained of, they by deed granted and assigned to defendant, his executors, administrators, and assigns, all

that and those the liberty, license and authority, rights and privileges, granted to them by the said first-mentioned deed; to have, hold, use, exercise, and enjoy all and singular the premises thereby assigned unto and by defendant, his executors, administrators, and assigns, for his and their own use and benefit. That what was in the declaration complained of was all afterwards done in exercise of and pursuant to, and was authorized by, the said grant so made to defendant as aforesaid, and the license, liberty, and authority, rights, and privileges so to him granted as aforesaid, and were respectively uses of the said license, liberty, and authority, rights and privileges.

Replication, dated 25th January, 1859. Joinder of issue on the first, second, and third pleas. To fourth plea, on equitable grounds; That the deed of license by the said Jean Jacques Heilmann to the said Titus Salt, Edward Akroyd and Henry Akroyd, in that plea mentioned, was an indenture dated, made, and executed on 28th August, 1852; that by a certain other indenture, bearing even date with the said indenture of license, and made and executed on the same day, between Jean Jacques Heilmann (since deceased), of the first part; plaintiff, together with Jean Jacques Bourcart (since [*859 *deceased), Jean Schlumberger, Henri Schlumberger, Henri Bourcart and Charles Bourcart, of the second part; and the said Titus Salt, Edward Akroyd, and Henry Akroyd, of the third part; after reciting, amongst other things, the grant to the said Josué Heilmann, since deceased, of the letters patent, and that, under certain arrangements made between the said Josué Heilmann and the said parties to the said indenture of the second part, the said parties of the second part were entitled to participate in the profits to be derived from the said letters patent, and that the said Josué Heilmann had died intestate, and that letters of administration of his estate and effects had been granted to his son Jean Jacques Heilmann; and that the said Titus Salt, Edward Akroyd, and Henry Akroyd had contracted and agreed with the said parties thereto of the first and second parts, for the absolute purchase of a license for the exclusive use of the invention in the declaration mentioned, so far as it in any way related to the preparing and combing of all kinds of animal wool and hair; and further, as the fact was, that it had been agreed that the said contract should be carried out in manner thereafter appearing, and that such covenants should be entered into as were thereafter contained; and further, as the fact was, that, in pursuance and part performance of the said contract, by an indenture bearing even date with those presents, and made between the said Jean Jacques Heilmann, of the one part, and the said Titus Salt, Edward Akroyd, and Henry Akroyd, of the other part (being the said deed of license in the said fourth plea mentioned), the said Jean Jacques Heilmann as such administrator as aforesaid had granted to the said Titus Salt, Edward Akroyd, and Henry Akroyd *such exclusive liberty and license to make, [*860 use, and vend the said invention, as in the said fourth plea was mentioned and described: It was witnessed that, in pursuance of the said recited contract, and in pursuance of the agreement in that behalf thereinbefore recited, and in consideration of the premises, each one of the several persons, parties to the said indenture, did thereby for himself, his heirs, executors, and administrators, covenant

and agree with the others of them, that the said Titus Salt, Edward Akroyd, and Henry Akroyd, their executors, administrators, or assigns, or any of them, should not manufacture machines, under or by virtue of the said license, for sale out of Great Britain and Ireland. Of all which premises defendant, before the granting and assignment by the said Titus Salt, Edward Akroyd, and Henry Akroyd to him of the said liberty and license, as in the fourth plea mentioned, and before the committing of the grievances in the declaration mentioned, had notice. That afterwards, on 30th October, 1852, by a certain indenture then made between the said Titus Salt, Edward Akroyd, and Henry Akroyd, of the one part, and defendant, of the other part: After reciting, amongst other things, the grant to the said Josué Heilmann of the said letters patent, as in the declaration mentioned, and that the said Josué Heilmann had died intestate on 5th November, 1848, and that letters of administration of his estate and effects were granted to his son, Jean Jacques Heilmann; and reciting the granting of the said license dated 28th August, 1852, by the said Jean Jacques Heilmann to the said Titus Salt, Edward Akroyd, and Henry Akroyd, their executors, administrators, and assigns, as in the fourth plea mentioned; and reciting the making of the said indenture, also bearing date 28th August, 1852, *between the said respective parties *861] thereto of the first, second, and third parts; and that in the said indenture were contained certain covenants on the part of the said parties thereto, with respect to the said license so granted to the said Titus Salt, Edward Akroyd, and Henry Akroyd as aforesaid; and reciting that the said Titus Salt, Edward Akroyd, and Henry Akroyd had contracted and agreed with defendant for the sale to him of the said license, so granted to them as aforesaid (subject to certain exceptions not material to be herein mentioned), at a certain price therein stated, and that, in pursuance of the said agreement, by an indenture bearing even date with the now reciting indenture, that is to say, 30th October, 1852, the said Titus Salt, Edward Akroyd, and Henry Akroyd did grant and assign unto defendant all that and those the liberty, license, authority, rights, and privileges granted and conferred upon the said Titus Salt, Edward Akroyd, and Henry Akroyd by the said license or indenture of 28th August, 1852, thereinbefore recited (with certain exceptions not material to be here mentioned); it was witnessed that, in pursuance and further performance of the said contract, and in consideration of the premises, defendant did, for himself, his heirs, executors, and administrators, covenant with the said Titus Salt, Edward Akroyd, and Henry Akroyd, their executors and administrators, that he, defendant, would pay to the said Titus Salt, Edward Akroyd, and Henry Akroyd, certain moneys in the manner therein provided; and, further, that he would thenceforth, from time to time and at all times thereafter, observe and perform all and every the covenants, conditions, and agreements in the said secondly thereinbefore recited indenture of 28th August, 1852, contained, on the part *of the said Titus Salt, Edward Akroyd, *862] and Henry Akroyd, their executors, administrators, or assigns, or any of them, thenceforth to be performed, or observed, with certain exceptions not material to be here set forth (but not excepting the covenant, herein-before mentioned, that the said Titus Salt, Edward

Akroyd, and Henry Akroyd, their executors, administrators, or assigns, or any of them, should not manufacture machines, under or by virtue of the said before-mentioned license, for sale out of Great Britain and Ireland); and should and would, from time to time, and at all times thereafter, save, defend, keep harmless and indemnified, the said Titus Salt, Edward Akroyd, and Henry Akroyd, their executors, administrators, and assigns, of, from, and against all actions, suits, damages, costs and expenses, claims and demands, for or by reason of the breach, non-observance, or non-performance of the said covenants, conditions, and agreements (except as aforesaid), or any of them.

Averment. That, afterwards, and after all the interest, right and title, of and in the said invention and letters patent, vested, and whilst the same remained vested, in plaintiff, defendant wrongfully, unlawfully, and unjustly, without the leave or license of plaintiff, or of any other person entitled to grant such leave or license, and against the will of plaintiff, in England, to wit at Bradford and Leeds, made, for sale out of Great Britain and Ireland, to wit one thousand machines, in imitation of the said invention, and sold the same out of Great Britain and Ireland. And did at Bradford and Leeds aforesaid make, for sale out of Great Britain and Ireland, divers to wit one thousand machines in imitation of parts of the said invention, and did sell the same out of Great Britain and *Ireland. And did make, use, [*863 exercise, and put in practice the said invention, and divers, to wit, all the parts thereof, by making, at Bradford and Leeds aforesaid, for sale, and selling, out of Great Britain and Ireland, divers, to wit, one thousand machines, in imitation of the said invention, and did sell the same out of Great Britain and Ireland: and did counterfeit and imitate, and did use and put in practice, the said invention, by making, at Bradford and Leeds aforesaid, for sale out of Great Britain and Ireland, divers, to wit, one thousand machines, in imitation of the said invention; and did sell the same out of Great Britain and Ireland: and did counterfeit and imitate in part the said invention, and did use and put in practice in part the said invention, by making, at Bradford and Leeds aforesaid, for sale out of Great Britain and Ireland, divers, to wit, one thousand machines, in imitation in part of the said invention, and did sell the same out of Great Britain and Ireland: Which were the several grievances in the declaration respectively complained of.

Rejoinder, dated 9th February. Joinder of issue on the replication to the fourth plea. Demurrer to same.

23d April. Joinder in demurrer.

On 30th April, *Montague Smith* obtained a rule calling upon the plaintiff to show cause why the defendant should not be at liberty to rejoin certain matters on equitable grounds.

The abstract of the proposed rejoinder was as follows: That defendant has been innocently, and in ignorance of the restriction in the license, for many years committing the grievances now complained of, without objection on the part of plaintiff, though plaintiff knew of the committing of the grievances so long ago as *1853, and [*864 from time to time afterwards; that plaintiff might have given defendant notice, but neglected to do so; that, during that time, plaintiff received in a foreign country, where he has the exclusive right to

the use of the said invention, compensation for the said use, there, of machines made, as he then knew, by defendant, for sale abroad, in violation of the equitable restriction; that the grievances committed before plaintiff was guilty of such laches were committed more than six years before action, and that the other grievances were committed after the laches and during the continuance thereof, and before plaintiff gave notice of his objection, and while defendant was ignorant that he was doing wrong, and was acting, as he supposed, in the lawful enjoyment of his rights; and that the notice mentioned in the replication was not a notice which gave defendant personal knowledge of the matters; that before J. J. Heilmann granted the license, and before Salt and the Akroyds covenanted as stated in the replication, and before there was any agreement for a restriction on the license, defendant contracted with Salt and the Akroyds for the grant to himself; that the agreement was in writing (setting it out), being the same as set out in the bill in Chancery hereinafter mentioned; and that defendant was, and continued, ignorant of the restriction, and of the agreement for the restriction, until the license was granted to him and he covenanted as stated in the replication, and paid 30,000*l*. for the grant; that the only agreement which he knew of, for the granting of the license by Heilmann, was that contained in the letters set out in pages 4 and 5 of the bill, which are set out in the rejoinder; that there was no valuable consideration for the restriction; that *865] defendant's covenant set out in the replication extended *by mistake and inadvertence to the covenant of Salt and the Akroyds set out in the replication, and without defendant's knowledge or consent, and without culpable negligence on the part of defendant; that Salt and the Akroyds are able to pay all damages claimed by the plaintiff.

The rule was made returnable at Chambers, but, Blackburn, J., refusing to allow the rejoinder, the case was now argued before the Court.

It appeared that the defendant had filed before, and had amended since, the delivery of the equitable replication, a bill in Chancery, praying that the deed of 28th August, 1852, might be reformed and rectified, by striking out or erasing therefrom the covenant that Salt and the Akroyds "shall not manufacture machines under or by virtue of the said licenses, for sale out of Great Britain and Ireland." By the same bill it was also prayed that the plaintiff might be restrained from proceeding with this action until the hearing of the cause in which the bill was filed, and that the defendant might have such other relief as the circumstances of the case required.

Bovill, Hannen, and Cotton now showed cause.^(a)—The rejoinder ought not to be allowed. By his fourth plea the defendant sets up, as an answer to the action, that he was licensed to use the invention by grant from Salt and the Akroyds, to whom a similar license had been granted by the administrator of the inventor. To this the plaintiff replies, on equitable grounds, that Salt *and the Akroyds *866] covenanted, by a deed of the same date as that of the license to them, that they would not manufacture machines, under or by

(a) The demurrer to the equitable replication to the fourth plea was not argued till Michaelmas Term, 1860. The report of it is subjoined at page 870.

virtue of the license, for sale abroad. This replication is possibly a good legal answer to the fourth plea. It was delivered on 25th January, 1859; the defendant having, before then, on 23d January, filed the bill in Chancery referred to in the proposed rejoinder. This bill was amended on 7th February, and is, by order, dated 3d February. In it the defendant prays, amongst other things, that the plaintiff may be restrained from going on with this action until the cause in which the bill was filed is heard. Having elected to pursue his remedy in equity, the defendant cannot be allowed to set up the same matters in this Court, as he seeks to do by the rejoinder, otherwise he would, in effect, be prosecuting the bill in a Court of common law.

Montague Smith and Fooks, contra.—If the defendant has a defence on equitable grounds, he is not precluded from relying on it as an answer to the action, merely because he has also taken proceedings in Chancery. The plaintiff, by his equitable replication to the fourth plea, sets up an equity, which the defendant is entitled to displace by the proposed rejoinder setting up a counter equity. By so doing he would not be prosecuting his bill in this Court, the object of the bill being not merely to restrain the plaintiff from proceeding with this action, but to have the deed of 28th August, 1852, rectified by striking out the covenant by Salt and the Akroyds not to manufacture machines for sale abroad; a matter in which this Court has no jurisdiction.

*COCKBURN, C. J.—The rule which the Court ought to lay down in this case is as clear as possible, namely, that a party [*867 who has gone into a Court of equity for the purpose of defeating an action, or resisting a plea, where the record is in this Court, which is a Court of law, cannot be allowed to set up equitable matter here, which he has insisted upon and sought to have the benefit of elsewhere. Take for instance the case of a defendant sued at law upon a legal ground of action; and who thereupon resorts to a Court of equity to restrain the action. If, after so doing, he were to apply to the Court of law for leave to put a plea on equitable grounds on the record, he could not for a moment be permitted to do so. The same principle must apply to the ulterior stages of the action. It is clear that the object of the enactment in The Common Law Procedure Act, 1854, was to prevent the necessity for two suits with reference to the same subject-matter being at the same moment carried on in a Court of equity and a Court of law; and to obviate much harassing vexation to parties who, having no answer at law to an action, have a defence in equity, and are now enabled to avoid great and unnecessary expense by putting that defence, which often rests on very plain and simple grounds, on the record in the Court of law in which the action is brought. We should be frustrating the enactment, and introducing still greater inconvenience and mischief than formerly existed, were we to allow a party to take concurrent proceedings at law and in equity with a view to relief. I think that we are bound to lay down, I will not say an invariable rule, but a rule invariable except under special circumstances, such as I can hardly contemplate at this moment, that, if a party goes to a *Court of equity and seeks his remedy [*868

there, he cannot afterwards come to this Court and ask us to allow him to set up the same equitable matter here.

CROMPTON, J.—I am of the same opinion. The question, as I understand it, before my brother Blackburn, was whether or not he ought, in the exercise of his discretion, to have allowed the equitable rejoinder. Having allowed the plaintiff an equitable replication, he was applied to by the defendant for leave to plead an equitable rejoinder; and it seems at first sight a very reasonable and taking argument that, if the one is allowed, so also should be the other. Nor do I think that it can be doubted that an equitable rejoinder answering the matters set up by an equitable replication is admissible and allowable. But then we come to the question whether a party can be permitted to set up in this Court a ground of relief which he is also at the same time setting up in a Court of equity. I fully concur with what has fallen from the Chief Justice on this subject; and I, for one, would never, when sitting at Chambers, allow a party to plead an equitable plea or an equitable pleading of any kind, the subject-matter of which he was also setting up in a Court of equity. Now the plaintiff, in the present case, has not filed any bill or any answer in equity in which he has raised the subject-matter of his equitable replication in this action; but has chosen, as he has a right to do, to content himself with putting it on the record in this Court of law. The defendant, however, has chosen to take simultaneously two modes of answering that replication; one at law and the other in equity. He has got his bill amended in equity, and has brought forward in it, as *869] amended, *grounds for restraining the plaintiff from having the benefit of this equitable replication. He thus seeks to avoid the replication in equity, and now claims, by his proposed equitable rejoinder, to do the same thing at law. I have the strongest possible opinion that this ought to be prevented, as adding to the vexation and annoyance of a double procedure in two separate Courts, which it was the object of the recent statute to prevent. It would give rise to a mischief of the worst form; for it would convert that which is now a simple matter at law, though complicated in equity, into a complicated matter at law as well as in equity. It would also, practically, give an appellate jurisdiction from this Court to a Court of equity, which can never have been contemplated by the statute.

HILL, J., and BLACKBURN, J., concurred.

Rule discharged. (a)

(a) See next page, for the report of the argument of the demurrer to the equitable replication to the fourth plea in this case.

*870] *SCHLUMBERGER v. LISTER. Nov. 9.

Declaration by assignee of a patent for improvements in machinery, for its infringement by defendant, by making, selling, and counterfeiting the patented machines.

Plea. That the patentee died intestate while the patent was vested in him; that his administrator granted by deed to S. & A., and to such persons as they should from time to time license, empower, or authorize in that behalf, exclusive liberty and license to make, use, and vend. the invention throughout England and Wales, Berwick-upon-Tweed, Scotland, and Ireland; that S. & A. granted and assigned to defendant the said exclusive liberty and license; and that the alleged infringement was an exercise of that liberty and license.

Replication, on equitable grounds. That, by a certain other deed of the same date as the deed of license to S. & A., and made between the administrator of the patentee of the one part, plaintiff and five other persons (naming them) of the second part, and S. & A. of the third part, reciting that, by arrangement with the deceased patentee, the parties thereto of the second part were entitled to participate in the profits to be derived from the patent; and that S. & A. had contracted with the parties of the first and second parts for the absolute purchase of a license for the exclusive use of the invention, and it had been agreed that the said contract should be carried out as thereafter appeared, and that the covenants thereafter contained should be entered into; and reciting that, in part performance of the said contract, the deed of license to S. & A. (being the deed in the plea mentioned) had been executed: it was witnessed, in pursuance of the said contract, that each of the parties thereto thereby covenanted and agreed with the others of them that S. & A. should not manufacture machines, under or by virtue of the said license, for sale out of Great Britain and Ireland. Of all which defendant, before the granting and assignment of the said license by S. & A. to him, had notice. That afterwards, by deed dated 30th October, 1852, between S. & A. of the first and defendant of the second part, reciting the facts above stated, and that S. & A. had contracted with defendant to assign, and had, by a deed also dated 30th October, 1852, assigned to him the said license: it was witnessed that defendant covenanted with S. & A., inter alia, to observe and perform the covenant by them in the previous deed, not to manufacture machines, under or by virtue of the license, for sale out of Great Britain and Ireland: and to indemnify S. & A. from the consequences of the non-observance thereof. Averment of breaches by defendant of the covenant in question, by manufacturing the patented machines in England for sale out of England, and by the sale out of England of the patented machines and parts thereof.

Demurrer. Joinder in demurrer.

Held, that the replication was bad. That the license to S. & A. and the contemporaneous deed were not to be read as one deed, and that therefore the absolute terms of the former were not qualified by the covenants in the latter. That, although in equity defendant was bound by those covenants, a Court of common law could not do complete equity between all parties in the matter, having no jurisdiction to bring before it the five covenantees, parties, in addition to plaintiff, to the said contemporaneous deed, or to restrain possible future actions by them against defendant.

THE demurrer to the equitable replication to the fourth plea (which see ante, pp. 857, 858), came on for argument in Michaelmas Term, and may be conveniently inserted here.

**Montague Smith*, in support of the demurrer.—This replication is bad. It is an attempt to set up an equitable right in support of a legal claim. The declaration proceeds upon the alleged infringement of a legal right, namely, the exclusive use of the letters patent. The fourth plea answers this by setting up a license to the defendant, derived from the patentee, to use them. This perfectly valid legal defence, the plaintiff, by the replication, seeks to get rid of, by the deed contemporaneous with the original license from the patentee; which deed restricted the licensees from manufacturing, under the patent, machines for use out of the United Kingdom. Assuming, however, that the replication shows that defendant is bound by that deed, it does not restore the right which the plaintiff claims in the declaration, but sets up a new right altogether; that, namely, to the exclusive sale of the patented articles abroad. The replication is therefore a departure from the declaration, and an attempt to turn the plaintiff's equitable right to prevent a breach of the covenant into a legal right to sue for an infringement of the patent. The replication shows that the plaintiff has mistaken his remedy. He might have sued the defendant at law, for a breach of the covenant, or he might have gone into equity to restrain the defendant from breaking it by selling the machines abroad. But, having regard to the action which the plaintiff has actually brought, the contemporaneous deed can have no effect whatever, at law, on the license from Heilmann to Salt

and Akroyds to use the invention. The latter is absolute in its terms, and refers to no deed, and the deed is distinct from and collateral to it. The deed of license is, moreover, made between Heilmann and *872] Salt and Akroyds only, whereas the contemporaneous *deed embraces six other persons as parties. The plaintiff is but one of those six, and, under the deed, each of the plaintiff's five co-covenantees might bring a separate action against the defendant on the covenant. The Court would have no power to stay any of those actions, nor can it, if the replication is upheld, do complete justice in the present case between all parties; the other five persons not being before it. Again, there is nothing inequitable in the defendant's fourth plea. The plaintiff having elected to pursue a legal remedy which it is not competent to him to seek, equity would not restrain the defendant from setting up a legal defence to his claim. His proper course was to go into equity in the first instance. In a Court of common law an equitable replication cannot be allowed if it is inconsistent with the legal character of the right alleged in the declaration: *Reis v. Scottish Equitable Assurance Society*, 2 H. & N. 19.† If it were otherwise, the effect would be that actions founded on mere equitable grounds might be brought at law. But, as was said by Pollock, C. B., in *Hunter v. Gibbons*, 1 H. & N. 459,† "The relief in equity would be different from what the plaintiff would get here. The statute has made no provision for an equitable declaration." That case also shows that an equitable replication which will not administer the whole equity between the parties is inadmissible.

Bovill, contra.—The first question is, what is the effect of two deeds of the same date, to which the same persons are parties, and which are executed at the same time? Clearly, as between the parties to them, they are, if intended to carry out but one transaction, one *873] instrument: **Lord Cromwel's Case*, 2 Rep. 69 a, 74 a; *Montague v. Tidcome*, 2 Vern. 518. [HILL, J.—There the two deeds were between the same identical parties merely.] In Fonblanque's *Treatise on Equity*, sect. 14, p. 436 (ed. 5), it is laid down that, "it is a general rule, that several deeds made at one time, are to be taken as one assurance; yet every one hath its distinct operation to carry on the main design." There was but one transaction between Heilmann and Salt and Akroyds, which was carried out by means of the two deeds; those deeds are, therefore, to be read together as one. When the defendant purchased their interest from Salt and Akroyds, he had both deeds presented to him at the same time, he saw how one is controlled and affected by the other, and he bought such interest only as Salt and Akroyds had, subject to the provisions of both deeds. He cannot, after this, separate the two deeds, either in law or in equity. The replication, setting out these facts, is good, even at law, but at all events in equity. The effect of the two deeds taken together is, that the defendant is licensed to manufacture machines under the patent, in the United Kingdom, for all purposes except that of sale abroad. [HILL, J.—If it was intended that the two deeds should operate as one, why was not one deed made instead of two?] There may have been good reasons for that. In *Lord Cromwel's Case*, 2 Rep. 69 a, 74 a, in answer to an objection that a condition or rent cannot be saved in a collateral deed or record, but

ought to be saved in the same deed or record, it was resolved "that it is not of necessity, that the saving should be always in the same record or deed, but in some cases it may be contained in another deed, *although, by law, it might have been saved in the same deed or record." [*874] The defendant, at all events, is not in a position to complain of there having been two deeds instead of one. Inasmuch as he took with notice of both, he is in the same position as Salt and Akroyds, the original parties to both: *Tulk v. Moxhay*, 2 Phillips 774; *Patching v. Dubbins*, 1 Kay. 1. The plaintiff's legal right, apart from the license and the contemporaneous deed, that no one should manufacture the machines, is not the less a legal right because qualified by those instruments to this extent, that the defendant may manufacture them for sale in the United Kingdom only. [COCKBURN, C. J.—The difficulty in your way is, that the deeds were not between the same parties merely. But you had better address yourself to the other objection, which, at present, seems to us insuperable; namely, that the other parties to the second deed are not before the Court. We feel the force of the argument by the other side, that, if the plaintiff succeeds, the defendants will still be liable to the other covenantees, and that we could not restrain actions by them.] The plaintiff is in effect a trustee for, and therefore sufficiently represents, the other covenantees, who are identified with him in interest. It would be unnecessary to make them parties to a suit in equity. By the Chancery Procedure Amendment Act, 15 & 16 Vict. c. 86, s. 42, a defendant in any suit is not to take any objection for want of parties to the suit, in any case to which the rules set forth in that section extend: and the 9th of those rules is as follows: "In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons *beneficially interested under the trust, in the same manner and to the same extent as the executors or [*875] administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the parties beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties." [HILL, J.—There is no averment on this record, to identify the interest of the plaintiff and the other covenantees.] The declaration avers that the legal right and interest in the letters patent is vested in the plaintiff. The principle of the decision in *Vorley v. Barrett*, 1 C. B. N. S. 225 (E. C. L. R. vol. 87), is in favour of the plaintiff's application to be allowed to explain, by the replication, what the extent of that right is; and to show that, to that extent, it has never been parted with.

Montague Smith was not called upon to reply.

COCKBURN, C. J.—I am of opinion that our judgment should be for the defendant on both grounds. It is quite true, as Mr. *Bovill* has said, that where there are two contemporaneous deeds relating to the same subject-matter and made between the same parties, or, between parties having a complete identity of interest, and where the intention is that the whole should be not only one transaction, but that there should be but one agreement, the two deeds may be read as one.

*876] Here, however, it was plainly intended that there should be *an absolute license to use the invention; and, further, a contemporaneous deed containing covenants which should in some degree restrain the exercise of the license. That being so, I do not think that it is competent to us to say that the two deeds are to be read as one. In equity, indeed, the two might be considered together, and the second regarded as a condition upon the first. But as the effect of the two deeds is to give the licensor in the first, and, now, the plaintiff, who represents him, a right of action for the infringement of the patent, unless the license is set up in answer; and to give each of the covenantees in the second a right to sue for the breach of the covenant with them: it follows that the defendant would be liable to several actions for the very same act, none of which should we be able to restrain. Were the plaintiff to pursue his remedy in a Court of equity, that Court would compel him to bring before it all the parties interested both under the first deed and under the second. That we have no power to do; and it is therefore evident that, were we to allow the equitable replication, we should be doing an injustice. It would be absolutely necessary, in order for us to do complete justice, that we should have before us all the parties interested under both deeds; but we neither have nor can have them. Upon these grounds we are bound, in my opinion, to decline to exercise the limited equitable jurisdiction which we do possess, and to disallow the proposed replication.

(WIGHTMAN, J., was absent.)

HILL, J.—I am entirely of the same opinion. Looking at the two *877] deeds, it seems to me that they constitute but *one transaction; in the license, however, the parties have designedly omitted all reference to the second deed, thereby showing an intention that the license should, at law, be absolute. There is nothing to indicate that they intended to limit or qualify the license by the second deed, which embraces additional parties, and can be made available separately as a contract or covenant that the license should be exercised to a certain extent only. Moreover, there is no averment whatever on the record to identify the interest of the parties to the two deeds. I think, therefore, that the second deed is not a good answer at law to the fourth plea. Then, is it a good equitable answer? I think not; for this reason, that all the parties are not before us, and that we should have to deal with several interests, not represented in the action by any trustee within the meaning of the rule of Chancery procedure relied upon by Mr. Bovill. We should, moreover, be exposing the defendant to the risk of other actions, which we should have no power to restrain. I think, therefore, that the replication is bad, both as a legal and as an equitable replication.

BLACKBURN, J.—I am of the same opinion. I do not think that this replication is good in law, and I agree with what my brother Hill has said upon that point. Then comes the question whether it is a good equitable replication. Now, we are justified in holding a replication to be good upon equitable grounds only in a case where a Court of equity would, upon the facts stated in the replication, unconditionally restrain the defendant from setting up the defence which the replication professes to answer. We have, therefore, to consider

whether the plaintiff shows, by the replication, that he is entitled *to unconditional relief in equity. The action being for the infringement of a patent, the fourth plea sets up a good legal [*878 defence, that the patentee granted to persons who afterwards assigned it to the defendant a license to use the patent. In answer, the plaintiff sets up this equity: "True it is that such a license was granted, but by another agreement, contemporaneous with the grant, the defendant's assignors covenanted with me and with five other persons, not to exercise the patent by manufacturing the patented articles for sale abroad." Upon this ground the plaintiff seeks altogether to restrain the defendant from setting up the license. I am disposed to think that a Court of equity would, under proper circumstances, and if it had all the parties interested before it, consider the two deeds together, and restrain the defendant from setting up the license absolutely, without reference to the real bargain. That, however, would be done only upon terms imposed on all the parties to the bargain; and the Court would not interfere without restraining the other covenantees, in addition to the plaintiff, from suing the defendant. Those persons neither are nor can be brought before us. By allowing the replication, therefore, we should not be affording complete equitable relief. The plaintiff must go to a Court of equity to obtain relief upon such terms as shall make the equity complete.

Judgment for the defendants.

*CHAPPELL v. WATTS. May 8.

[*879

An Irishman ordinarily resident in Ireland, and having no place of abode in England, is compellable to give security for costs in an action brought by him in England, notwithstanding that he is at the time an officer in the army, serving with his regiment in Ireland.

F. M. WHITE had obtained a rule calling upon the defendant to show cause why an order of Blackburn, J., by which the plaintiff was ordered to give security for costs, should not be set aside.

It appeared from the affidavits that the plaintiff was an officer of Her Majesty's 93d Regiment of Foot, and that he was, at the time when the order was made, residing at Fermoy, in Ireland, on service with his regiment, which was stationed there. It also appeared that the plaintiff was an Irishman, and that he had no place of abode or residence in England.

Grove now showed cause.—The plaintiff is compellable to give security for costs. The usual ground for ordering a plaintiff to do so is that he is out of the jurisdiction. There is, no doubt, an exception; namely, that when the plaintiff is an Englishman and necessarily absent on the public service, he will not be made to give security although he is living out of the jurisdiction. But the present plaintiff, though absent on service with his regiment, is not an Englishman but a native and domiciled Irishman. He is not therefore entitled to the benefit of the exception. An Englishman serving the country abroad may be presumed to be involuntarily absent and so to have an *animus revertendi*. But an Irishman, who lives in Ireland when he is not on service, cannot be presumed to have an *animus revertendi* to

*880] *England, when he is on service in his own country. The statement of the exception in Chitty's Archbold's Practice (ed. 11 by Prentice), vol. 2, p. 1403, as follows, confines it to Englishmen: "Nor will this security be required to be given on the ground of plaintiff's absence abroad, when such absence is not voluntary, and the plaintiff is an Englishman; as in the case of naval and military officers, and other persons engaged abroad in the public service." In *Fitzgerald v. Whitmore*, 1 T. R. 362, it was urged for the plaintiff, a resident in Ireland, that it would be impolitic to extend to Ireland, the rule then lately adopted, requiring foreigners to give security for costs; but the Court, notwithstanding, stayed the proceedings till security should be given. The cases of *Lord Nugent v. Harcourt*, 2 Dowl. 578, and *Evering v. Chiffenden*, 7 Dowl. 536, in which the plaintiffs were Englishmen, and were excused from giving security, show the ground of the exemption. [COCKBURN, C. J.—The plaintiff's domicile being in Ireland, his position is not altered by his regiment being on service there.]

F. M. White, contra.—There is no valid reason why the rule applicable to the case of an English officer absent from this country with his regiment should not apply to that of an Irish officer in the same position. In *Lush's Practice*, p. 695 (ed. 2), it is laid down that "A plaintiff holding an appointment abroad under the British Crown not in its nature permanent, and a soldier or sailor on foreign service, are not required to give security." Nothing is said as to the nationality of the soldier or sailor. In the present case, it does not *appear *881] from the affidavits that the plaintiff has any permanent residence apart from the place where his regiment is quartered: and, in the absence of evidence to the contrary, it is to be presumed that he has no other ordinary residence than with his regiment. If so, he is entitled to the benefit of the general rule exempting soldiers and sailors on service from giving security for costs; the reason for the rule being that their residence at the place of service is involuntary and compulsory.

Watkin Williams, amicus curiæ.—In *Whittall v. Campbell*, 5 H. & N. 601,† decided yesterday, the Court of Exchequer, following *Garwood v. Bradburn*, 9 Dowl. 1031, held that the plaintiff, an officer in Her Majesty's Indian army, permanently residing and on active service in India, could not be compelled to give security for costs; on the ground that he was not voluntarily abroad, not being able to remain or return at his will.

COCKBURN, C. J.—As there has been so recent a decision on the point in the Court of Exchequer, we will consult the learned Judges of that Court before giving our judgment.

Judgment was delivered later in the day as follows.

COCKBURN, C. J.—We have consulted the Judges of the Court of Exchequer, as to the ground on which they decided the case before them, and we find that the only question which they took into consideration was whether an officer in the Indian army, who had been in it before its transfer from The East India Company to the Crown, *882] was, after that transfer, entitled to the same privileges *against giving security for costs as if he had been originally in the service of the Crown. The Court held that he was; but their decision does not touch the point before us. We think that the present plain-

tiff ought to give security for costs. He is of Irish birth, and his regiment is now serving in Ireland. Had it been made appear to us that his residence is ordinarily in England and not in Ireland, our decision would have been different; for the true ground of the exemption of a soldier on service out of this country from giving security for costs is, not that he cannot come over here to conduct his action, but that he is not to be placed in a worse position, because he is out of the jurisdiction by the order of the British Crown. In the case before us, the plaintiff, who is not ordinarily resident within the jurisdiction of the Court, is at present in service in Ireland with his regiment. How can it be said that he is placed in a worse position by being called upon to do that which, independently of his military service, he would be called upon to do by reason of his being ordinarily resident in Ireland? The circumstance that he is a soldier in actual service cannot give him an advantage over any other plaintiff who is ordinarily resident out of the jurisdiction.

CROMPTON, J.—I am of the same opinion. It appears from the affidavits that the plaintiff is a native of Ireland and is ordinarily resident in that country. The circumstance that Ireland is the country of his birth is immaterial; but the fact that it is the place of his ordinary residence is conclusive. The criterion in these cases is, Is the plaintiff kept away from his ordinary residence in England by reason of his being in the service of the *Crown? If so, he ought not to give security for costs. But in this case the plaintiff is living in his own country, where he would ordinarily reside whether serving with his regiment or not. He, therefore, is not entitled to the privilege which he claims. [*883

HILL, J., and BLACKBURN, J., concurred.

Rule discharged.

JAMES v. LORD HARRY VANE. *May 8.*

To an action on the common indebitatus counts, the writ of summons in which was endorsed for a debt of more than 20*l.*, consisting of separable items, defendant pleaded, except as to part of the claim, Never indebted, and, as to that part, which also exceeded 20*l.*, a tender of it before action, and payment of it into Court. At the trial of issues joined on these pleas the jury found for defendant as to the tender, and for plaintiff that the sum tendered was too little, by 2*l.* 8*s.* 10*d.*, to satisfy his claim.

Held, that plaintiff had recovered 2*l.* 8*s.* 10*d.* only in the action, and was, therefore, not entitled to have his costs taxed by the Master on the higher scale; having, within the meaning of the directions to the Masters of Hil. Term, 1853, No. 8, failed to recover more than 20*l.*

THE declaration contained counts for goods sold and delivered, work and labour done and materials for the same provided, the use and occupation of rooms and apartments, and on an account stated.

Pleas 1. Except as to 26*l.* 10*s.* 6*d.*, parcel of plaintiff's claim: Never indebted. Issue thereon. 2. As to the said sum of 26*l.* 10*s.* 6*d.*: That defendant was always ready and willing to pay plaintiff the said sum of 26*l.* 10*s.* 6*d.*, parcel of the money claimed, and that before action he tendered and offered to pay the same to plaintiff, but he refused to accept it; and that defendant now brought into Court the said sum of 26*l.* 10*s.* 6*d.*, ready to be paid to plaintiff. Issue thereon.

At the trial, at the Durham Spring Assizes, 1860, it appeared that

*884] the action was brought to recover two *sums of 24l. 8s. 10d. and 4l. 10s. 6d., which were endorsed on the writ of summons; and the jury found, as to 26l. 10s. 6d., that the defendant did, before action, tender and offer to pay that sum to the plaintiff, but that he refused to accept it; and that the said sum was not sufficient by 2l. 8s. 10d., to satisfy the claim of the plaintiff. The Judge refused to certify that the cause was a proper one to be tried before him; and, upon taxation, the Master decided that the plaintiff was entitled to costs upon the higher scale, and taxed them accordingly.

Hindmarch having obtained a rule calling upon the plaintiff to show cause why the master should not review his taxation,

Pigott, Serjt., now showed cause.—The Master was right in taxing the costs on the higher scale. The question depends upon the construction to be put upon No. 8 of the Directions to the Masters, of Hilary Term, 1853, which provides that “where in” “actions” of contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, “the sum endorsed on the summons shall be more than 20l., but the plaintiff fails to recover more than that sum, and the Judge does not certify” that the cause was proper to be tried before him, “the plaintiff’s costs against the defendant, whether between party and party or between attorney and client, shall be taxed as upon a writ of trial before a Judge of a Court of record where attorneys are not allowed to act as advocates,” “but the defendant’s costs, if any, are to be taxed upon the higher scale.” Unless, therefore, it can be said that the plaintiff has failed to recover *885] more than 20l., he is entitled to costs *on the higher scale. And he has not failed to do so, for he has recovered the whole amount of his claim, including the sum tendered before action and paid into Court. It is true that, in *Dixon v. Walker*, 7 M. & W. 214,† the Court of Exchequer has decided that where a plaintiff claims more than 20l. but obtains a verdict for a sum under 20l., by reason of a tender of the remainder of the amount claimed, before action brought, his costs must be taxed on the reduced scale. But in *Cooch v. Maltby*, 23 L. J. N. S. Q. B. 305 (Bail Court), Wightman, J., held, on the contrary, that an amount tendered by the defendant before action was, notwithstanding a verdict for him on an issue taken on a plea of tender, part of the amount recovered in the action; on the ground, not adverted to in *Dixon v. Walker*, that a plea of tender is not in bar of the action, but in bar of the damages only. There are no other authorities directly in point. In *Tonge v. Chadwick*, 5 E. & B. 950 (E. C. L. R. vol. 85), the defendant proved a set-off which reduced the plaintiff’s claim to less than 20l., and it was held that the plaintiff had failed to recover more than 20l., and was entitled to costs on the lower scale only. But a plea of set-off is a plea in bar of the action, which, as pointed out by Wightman, J., a plea of tender is not. Moreover, the plaintiff in that case actually received no more than the balance of his claim after deducting the set-off: whereas here, the plaintiff has, by the action, obtained the whole of his claim, and was obliged to sue for the whole. [HILL, J.—Suppose that, to an action brought to recover 50l., the defendant were to plead simply a *886] plea of *tender of that amount, and that he brought the money into Court; and suppose that the verdict was for the defendant.

The judgment must be for the defendant, with costs: the plaintiff could not have judgment, it being his own fault that he did not take the money before action, when he could have had it.] The plaintiff would, even in that case, be entitled to judgment for nominal damages, if it be law that the plea of tender is not in bar of the action. At all events, a tender of part of an entire demand is inoperative: *Dixon v. Clark*, 5 C. B. 365 (E. C. L. R. vol. 57). [CROMPTON, J.—The amount paid into and taken out of Court upon a plea of tender cannot be included in the amount for which the plaintiff may sign judgment. HILL, J.—The action must be considered to have been brought for the excess due to the plaintiff beyond the sum tendered. BLACKBURN, J.—In Bac. Abr. tit. *Tender* (I) it is laid down that “It is in the general true, that if the money, or other thing which has been tendered, be upon pleading the tender brought into Court, the plaintiff is entitled thereto, although he should afterwards be nonsuited, or there should be a verdict against him.” How can a nonsuited plaintiff be said to recover the amount paid in? HILL, J.—In Tidd’s Practice, p. 971 (ed. 9), it is laid down, following the judgment of this Court in *Postan v. Stanway*, 5 East 261, 262, that “In assumpsit, where the defendant pleads non assumpsit as to all but a particular sum, and as to that sum a tender; and on the trial, the fact of the tender is found for him, but that the sum tendered was not sufficient, by which the plaintiff has a verdict on the general issue, and judgment for his *damages and costs; in such case, there is not an instance of the costs of the issue, on the plea of tender, ever having been taxed for the defendant.”] [*887

Hindmarch, contra, was not called upon.

COCKBURN, C. J.—We are all agreed that this rule must be made absolute. I had not the advantage of hearing Mr. *Hindmarch* move for the rule, but I am told by my brothers that he then threw great light upon the matter, and the view they were then inclined to take is now confirmed. Upon the substantial justice of the case I have no doubt. Where a plaintiff claims an amount which is the result of one inseparable demand, he is entitled to say to the defendant, if the defendant tenders a smaller sum, that he will not take less than the whole. In such a case the tender comes to nothing. But where the whole demand is made up of an aggregate of separable items, and the defendant makes a tender in respect of some of them, the plaintiff is wrong if he refuses to accept it; and ought not to be allowed, by so doing, to keep that portion of his claim alive, and to get costs upon the higher scale by bringing the defendant before a superior Court. If he declines to take that which the defendant was always ready to pay him, and brings an action in a superior Court, justice requires that, if he fails as to that part of his demand which has been tendered, he should be treated as having brought the action for the other part only. Then, is there any technical objection to his being so treated? My brother *Pigott* says that a plea of tender is not in bar of the action; and that the plaintiff must be considered to recover the whole of his *claim because he gets the whole. But that is not the true effect of the proceedings. The plaintiff does [*888 not really recover the amount of the tender, but only the excess of his claim above that amount; as is evident from the consideration

that, in the case of a plea of tender and payment into Court of the whole of the sum claimed, the defendant has judgment and costs if the plaintiff afterwards goes on with the action and the tender is proved. The excess of the plaintiff's claim over the tender in the present case being under 20*l.* the plaintiff has not recovered a sufficient amount to entitle him to costs on the higher scale. The rule must therefore be made absolute.

CROMPTON, J.—I am of the same opinion. Mr. *Hindmarch*, on moving for the rule, satisfied me that the prior decision^(a) is more correct than the later;^(b) though I was at first inclined to think otherwise. We have to consider whether the plaintiff has recovered the whole amount of his claim, within the true sense of the 8th direction to the Masters. It is argued that he is obliged to bring the action for the larger sum; but the same might be said where a set-off is pleaded. But what is it that the plaintiff recovers? Only the excess which he proves to be owing to him beyond the sum tendered. In early times, when pleading was *ore tenus*, the defendant would bring the money in a bag into Court, and would say to the plaintiff, "Here is your money: I have always been ready and willing to pay and have offered to pay it you, and you might have had it at any time." Now, *889] instead of doing that, the *defendant pays it to the officer of the Court, who is supposed to hold it for the plaintiff, and to have it in Court ready for him whenever he chooses to take it. That being so, the plaintiff cannot be said to recover it, for he has, or can have, it as soon as it is paid in. Moreover, as it is plain that he could recover nothing if the whole amount due had been tendered to him before action, it follows that, when part has been so tendered, he can be said to recover so much only of the demand as is in excess of that part.

HILL, J.—I am of the same opinion. I think that the plaintiff has not recovered the sum which the defendant had tendered. I go the length of saying that he did not even, in point of law, bring his action for that sum. He could not do so, and thereby take advantage of his own refusal to take the money which was offered to and ready for him before action. As to the sum tendered, the action was brought causelessly, and in the result the plaintiff has recovered no more than the excess.

BLACKBURN, J.—I am of the same opinion. My only doubt was whether, technically speaking, the plaintiff has not recovered the whole of his claim. When, however, I reflect that the sum tendered was his before the action was brought, and that he might have had it without suing, I am satisfied that he cannot be said to recover it by means of the action, but only the excess, beyond it, of his original demand.
Rule absolute.

(a) *Dixon v. Walker*, 7 M. & W. 214.†

(b) *Cooch v. Maltby*, 23 L. J. N. S. Q. B. 305 (Bail Court).

***GUMM v. FOWLER.** *May 8.*

[*890]

The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 5, provides that "it shall be lawful for" an "arbitrator," upon a reference by consent where the submission may be made a rule of Court, "if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court." By sect. 32, "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary."

A cause and other matters in difference were referred by consent, by order of *Nisi Prius*. The order contained no clause relating to the statement of a special case by the arbitrator; but it provided that the parties should not bring error against him or each other, respecting the matters referred. In pursuance of sect. 5 the arbitrator, at the request of the parties, stated his award, as to the cause only, in the form of a special case for the opinion of this Court; and the Court gave judgment thereon for defendant.

Held, first, that plaintiff could not, under sect. 32, bring error upon this judgment; the opinion of the Court on a special case stated under sect. 5 being merely an ancillary proceeding to the award, which the arbitrator has still to make; not a judgment of the Court as a tribunal, as the judgment upon a special case stated instead of a special verdict is. Secondly that, independently of the statute, plaintiff was precluded by express agreement from bringing error.

RULE calling upon defendant to show cause why an order of Crompton, J., that the proceedings in error taken by plaintiff should be set aside, should not be rescinded.

It appeared from the affidavit of the plaintiff's attorney that, by order of *Nisi Prius*, the action and other matters in difference had been referred, by consent, to an arbitrator. The order contained no clause to empower the arbitrator to state a case for the opinion of the Court, but one of the terms of it was that the parties should bring no writ of error, respecting the matters referred, against the arbitrator or against each other. The arbitrator, at the request of the parties, as to part of the matter referred to him, namely, so far as the cause was concerned, stated his award in the form of a special case for the opinion of this Court. The case was argued, and judgment was given for the defendant. The plaintiff thereupon alleged error, and lodged a *memorandum thereof with one of the Masters of the Court; and, shortly afterwards, a statement of the grounds of error was delivered to the attorneys of the defendant. Thereupon those attorneys took out a summons calling on the plaintiff to show cause why the proceedings taken in error should not be set aside, on the ground that error did not lie in such a case. Upon the hearing of the summons Crompton, J., made an order to set aside the proceedings in error. [*891]

Bovill now showed cause.—This is not a case in which error will lie. In the first place, the plaintiff has expressly agreed not to bring error. But, secondly, even if that agreement is to be construed as restricting the plaintiff from bringing error on the decision of the arbitrator only, and it is said that he has, in the present proceedings, brought error upon the judgment of the Court, there is no such judgment of the Court as that error will lie upon it. The arbitrator stated a special case for the opinion of the Court, as to part only of the matters referred, in pursuance of The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 5, which provides that "it shall be

lawful for" him "if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court." The object of this enactment was merely to enable the arbitrator to come to the Court for advice, and obtain its opinion as an ancillary help to him in making the award. It can never have been intended to supersede the arbitrator by the *892] Court, and thereby risk carrying *a cause, after it has been once referred to a private tribunal, through all the Courts of appeal. [COCKBURN, C. J.—That certainly appears to be the correct view of the effect of the section in question.] (He was then stopped.)

Watkin Williams, contra.—The plaintiff is entitled to bring error. By sect. 32 of the Act "Error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary." There is no express or implied exception of a judgment upon a special case stated by an arbitrator; and the plaintiff has not agreed to the contrary, the appeal being from the decision of the Court, not of the arbitrator, upon which latter alone the plaintiff has agreed not to bring error. The other side would, probably, not deny that error might have been brought upon the judgment of the Court, had the arbitrator been expressly empowered by the submission to state a case; but the statute virtually introduces into the submission a clause giving him that power. [COCKBURN, C. J.—A special case stated by the arbitrator in pursuance of an express power in the submission would be stated for the judgment of the Court, whereas a case stated by him under sect. 5 of the Act is stated for the Court's opinion, as auxiliary to that of the arbitrator. Suppose that the present case went to the Exchequer Chamber, and thence to the House of Lords; and that both those Courts gave judgment in your favour; but that the arbitrator, notwithstanding, afterwards made his award the other way. Would you have any remedy against him?] The arbitrator *893] could not disregard those *judgments; after once stating the case he has nothing more to do than to abide by the ultimate decision of the Courts upon it. In *Oldershaw v. King*, 26 L. J. N. S. Exch. 384, an order was made, by consent, for the statement of a special case; the case was stated, judgment was given upon it, and the Court of Exchequer allowed the unsuccessful party to bring error, although the order contained the terms, which the Court struck out, "the parties agreeing in every respect to be bound by the judgment of the Court." [CROMPTON, J.—That was a regular special case; but the present was merely a proceeding for the assistance of the arbitrator.]

COCKBURN, C. J.—I am of opinion that this rule must be discharged. The question is, whether the provision in sect. 32 of the Act, that error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, applies to a special case stated by an arbitrator under the provisions of sect. 5. I am clearly of opinion that it does not. In sect. 32 it was the intention of the Legislature to enable the parties to an action who have, by agreement, stated the facts in the shape of a special case, to pro-

ceed to a Court of error in case of dissatisfaction with the judgment of the Court for the opinion of which the case is stated. It was thought right to put such parties in the same position as if the facts had been ascertained by the old proceeding of a special verdict, and thereby to enable them to avoid considerable expense. But when a cause is referred to an arbitrator, and it is agreed that his decision is to be binding, the parties have chosen to substitute a private tribunal for the Court. Then *sect. 5 of the Act enables the arbitrator [*894 to obtain the assistance of the Court by stating a special case for their opinion upon points of law which may arise in the course of his investigation; and upon which he may not feel competent to decide without that assistance. That, however, is a proceeding ancillary to the arbitration, and gives jurisdiction to the Court to this extent only, that, as provided by sect. 5, when an action is referred, judgment may, if so ordered, be entered according to the opinion of the Court. Independently of these considerations, moreover, the parties in the present case have expressly agreed not to bring error. Were error to be brought, it could be brought only on the judgment as entered upon the facts as found by the arbitrator, and the special case would not appear upon the record at all. On both grounds, therefore, namely, that the parties have expressly agreed not to bring error, and that there is no judgment of the Court on which error can be brought, I think that the rule must be discharged.

CROMPTON, J.—I am of the same opinion. There is a clear distinction between a special case stated to save the necessity for a special verdict, and a special case stated by an arbitrator. Error may by sect. 32 of the Act, be brought upon the judgment of the Court upon the former; for this reason, that that judgment is substituted for a judgment upon a special verdict. But an arbitrator states a case under sect. 5 merely in order to obtain the opinion of the Court for his assistance, and the ultimate decision is his, not that of the Court. Moreover, the express agreement between the parties, in the present case, of itself precludes the plaintiff from bringing error.

*HILL, J.—I am of the same opinion. A special case stated [*895 by an arbitrator, under sect. 5, is not invested with all the attributes of the special case referred to in sect. 32. If the present parties intended to have the power of bringing error upon the result of the special case, they should have provided for so doing by a different agreement from that which they have entered into.

BLACKBURN, J.—The terms of sect. 5 show that the arbitrator, notwithstanding he states a special case for the opinion of the Court, is still to make his award. Then, does sect. 32 enable the parties to bring error on the decision in such a special case? It is clear that it does not; and that it contemplates only a special case upon which the judgment of the Court can be entered, as upon a special verdict. If parties wish to have the option of going into error, they must agree to state a special case of that description, instead of referring the matter to arbitration.

Rule discharged.

CASES

ARGUED AND DETERMINED

IN

Easter Vacation,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1860.

The Judges of the Court of Queen's Bench who sat in banc in this Vacation were:—

COCKBURN, C. J.
CROMPTON, J.

HILL, J.
BLACKBURN, J.

HARWOOD *v.* THE GREAT NORTHERN RAILWAY COMPANY. *May 9.*

[Reported, in the Queen's Bench and in the Exchequer Chamber on error from that Court, 2 B. & S. 194.]

END OF EASTER VACATION.

CASES

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

Trinity Term,

IN THE

TWENTY-THIRD YEAR OF THE REIGN OF VICTORIA. 1860.

The Judges who usually sat in banc in this Term were:—

COCKBURN, C. J.
WIGHTMAN, J.

CROMPTON, J.
BLACKBURN, J.

BAKER and Others *v.* TYNTE. *May 22.*

Stat. 1 & 2 Vict. c. 110, s. 14, provides that stock in the public funds "standing in" the "name" of a judgment-debtor "in his own right, or in the name of any person in trust for him," may be charged by Judge's order with payment of the amount of the judgment-debt and interest. Stat. 3 & 4 Vict. c. 82, s. 1, extends this provision to "the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent," in such stock.

Held, that the contingent reversionary life interest of a judgment-debtor in the surplus, if any, of stock standing in the name of trustees, and assigned by him to another set of trustees on trust to sell it and pay his debts to a named amount, with a resulting trust, as to the surplus after such payment (subject to the present life interest of another person therein), in favour of the debtor, is chargeable under these enactments, notwithstanding the doubtful nature of the interest and the uncertainty as to its extent.

J. D. COLERIDGE had obtained a rule, calling on the plaintiffs to show cause why two orders *of Blackburn, J., dated 24th December, 1859, and 18th January, 1860, respectively, should [*898 not be rescinded.

The first was an order *nisi*, under stat. 1 & 2 Vict. c. 110, ss. 14, 15, charging "the defendant's reversionary life interest" in three several sums in different public stocks, amounting in the whole to about

44,500*l.*, standing, in the names of certain trustees, in the books of the Bank of England, with the sum of 6000*l.* and interest at 5*l.* per cent. from 9th March, 1854, together with the sum of 240*l.* 19*s.* costs and interest on that sum from 3d December, 1856.

The second was an order charging the same interest of the defendant for a week, and after that time absolutely, unless within the week the Court should be moved to interfere.

It appeared from the affidavits that the plaintiffs were the executors of George Tate Baker, deceased. The testator had, on 10th March, 1847, recovered judgment against the defendant for 12,000*l.* with costs, on a warrant of attorney to secure the repayment of 6000*l.*, with 5*l.* per cent. interest from 9th March, 1847. On 15th August, 1856, a writ of revivor was issued by the plaintiffs, and on 3d December, 1856, judgment was signed for 12,040*l.* 19*s.*, debt and costs, there being due from the defendant to the plaintiffs, on the warrant of attorney and for costs, the amount mentioned in the orders.

At the date of the first order there were, and still remain, standing in the books of the Bank of England, in the names of the trustees mentioned in the order, the sums mentioned, in which the defendant had a reversionary interest under the will of one George Tate. An indenture was made on 23d June, 1857, between Charles Kemys Kemys Tynte the elder, of the first part, *899] *Charles John Kemys Tynte (the defendant, his eldest son), of the second part, Charles Kemys Kemys Tynte the younger (eldest son of the defendant), of the third part, and Anthony Blaikie and James Randolph of the fourth part. The indenture recited the will of George Tate, by which the testator gave his daughter, Mary Tate (since deceased), 30,000*l.* 3*l.* per cents. reduced, at her own disposal, and also all his personal estate (except such other funded property as he should have, after payment of certain legacies), and devised all his real estate, situate as described in the will, to two trustees to the use of his said daughter for life, remainder to the first and other sons of his said daughter in tail male, remainder to the use of his cousins, Arabella Penfold (since deceased) and Louisa Penfold (now Louisa Penfold Tate), for life, remainder to the use of the said C. K. K. Tynte the elder, for life, remainder to the defendant for life, remainder to the first and other sons of the defendant in tail male, with remainders over; and the testator also bequeathed the residue of his funded property to the same trustees, in trust to pay the dividends to the person for the time being in possession of the real estate under the above limitations until the first tenant in tail should come into possession, and then to transfer such residue to such tenant in tail in possession. The indenture also recited that the residue of the funded property consisted of certain sums (being those sought to be charged by the orders of Blackburn, J.): that C. K. K. Tynte the younger was the eldest son of the defendant: that Louisa Penfold Tate was the present sole tenant for life in possession, being eighty years of age: that the defendant was indebted to several persons, and had charged annuities, &c., on landed estate to which he *900] was entitled *for life in remainder after the death of his father, and also an annuity on the landed estates demised as above, and that he was also indebted on various judgments. It was then

witnessed that the parties of the first, second, and third parts granted, &c., all their respective interests in the devised landed property to the parties of the fourth part in fee, subject to the life estate of Louisa Penfold Tate, and the aforesaid annuity, upon certain trusts. And C. K. K. Tynte the elder, so far as regarded the dividends which might accrue during his life, and the defendant, so far as regarded the dividends to accrue during his life, if he should survive the said C. K. K. Tynte the elder, assigned to Blaikie and Randolph all the dividends of the above-mentioned stock which, after the death of Louisa Penfold Tate, might accrue or become payable in the event of their respectively surviving her; and C. K. K. Tynte the younger assigned to Blaikie and Randolph his reversionary interest in the said stock, upon certain trusts. Blaikie and Randolph were then appointed attorneys to transfer and obtain payment of the stock, &c.; and the trusts declared were, without any further consent or concurrence on the part of C. K. K. Tynte the elder and C. K. K. Tynte the younger, to raise by mortgage of the real estate and *by sale of the said dividends and capital stock*, or any portion or portions thereof, or by either of these means, the sum of 65,000*l.*, &c.; and, subject to the trusts aforesaid, upon the trusts, as to the real estate, to convey the same to the trusts of Tate's will; and, as to the said dividends and capital stock assigned, to hold the same upon trusts corresponding with the trusts expressed and declared thereof in and by the said will. And it was further *declared that the said sum of 65,000*l.*, when raised [*901 as aforesaid, should, after payment of the costs, be applicable, first, to effecting policies on the life of the defendant in the name of C. K. K. Tynte the younger, for 65,000*l.*, as an indemnity, &c.; next, in payment and satisfaction of the mortgage and judgment debts of the defendant, and to the redemption of annuities so granted by him as above mentioned, &c.; and that the residue or surplus of the said sum of 65,000*l.* should be invested in the names or name of Blaikie and Randolph, or the survivor of them, his executors or administrators, in the purchase of consolidated bank annuities; and the dividends and capital and corpus of such bank annuities should be applied in keeping on foot the said policies, &c.; and also, during such period of the lifetime of the said C. K. K. Tynte the elder as the said Louisa Penfold Tate should be living, in payment of interest on so much of the 65,000*l.* as should be raised by mortgage, &c.: and, subject as aforesaid, the last-mentioned bank annuities and the dividends thereof were to be held in trust for the defendant.

— *Lush* and *Joyce* now showed cause.—The orders ought not to be rescinded. The contention for the defendant will be that they were improperly made, because he had previously assigned his interest in the stock charged by them. The plaintiffs, however, dispute the validity of the assignment; but, assuming that it is valid, there is, under the deed of assignment, at all events a resulting trust in favour of the defendant so far as any surplus beyond the sum of 65,000*l.* is concerned. And if there is a possibility that the defendant retains some interest, *the Court will confirm the orders. *Nicholls v. Rosewarne*, 6 C. B. N. S. 480 (E. C. L. R. vol. 95), shows that, [*902 there being no appeal from the decision of the Court, that is the proper course to adopt in a case where the interest of the debtor is

doubtful. [*J. D. Coleridge*, *contra*.—The defendant's contention is, that, as was decided in *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507, as soon as a cestui que trust's interest has been assigned to secure a debt, however small, the trustee ceases to hold for him, and there is nothing on which the charging order can attach.] That decision is inconsistent with that of this Court in *Watts v. Porter*, 3 E. & B. 743 (E. C. L. R. vol. 77). But, even if *Watts v. Porter* was wrongly decided, the present plaintiffs are entitled to charge the defendant's interest, *valeat quantum*. The trustees in whose name the stock is standing, must, having notice of the orders, take care how they deal with the funds in their hands. It will be for a Court of equity, when a bill is filed to enforce the order of this Court, to determine the extent of the defendant's interest. *Fuller v. Earle*, 7 Exch. 796,† shows that, if a charging order is rightly made, recourse must be had to equity for relief. Stat. 3 & 4 Vict. c. 82, s. 1, extends the provisions of stat. 1 & 2 Vict. c. 110, as to charging orders, to "the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent," in stocks or funds. Here, the orders purport to charge only such reversionary interest as the defendant has.

J. D. Coleridge and *Briggs*, *contra*.—The interest, if any, which the *903] defendant, under the deed of assignment, *retains in the stocks charged by the orders, is contingent and reversionary. But, in fact, he retains no interest whatever; for the deed is an absolute assignment of the corpus; and, that being so, the further trusts of the deed cannot be regarded by a Court of law. The trustees now hold in trust, not for the defendant, but for the persons in whose favour the interest has been assigned; and there is nothing upon which a charging order against the defendant, the cestui que trust who has assigned, can operate. By stat. 1 & 2 Vict. c. 110, sects. 14, 15, no stock can be charged which is not either "standing in" the judgment-debtor's "name in his own right, or in the name of any person in trust for him." [CROMPTON, J.—Can it be said that the trustees are not, after the assignment, trustees for all parties interested in the trust-fund, whether directly or contingently? WIGHTMAN, J.—Suppose that the assignment had been in trust to hold for the debtor himself.] Even then, the words of the Act would not have applied. [WIGHTMAN, J.—Your contention must certainly go that length, for there is here an express resulting trust for the debtor. COCKBURN, C. J.—It is begging the whole question to say that there is an absolute assignment. There may well be a surplus in the hands of the trustees after the purposes of the assignment have been satisfied: and quoad that surplus, if any, the defendant's interest remains unaffected.] For purposes of law, the assignment is co-extensive with the whole amount of the stock. If the Court makes the orders absolute, the trusts of the assignment cannot be carried out; for, by stat. 1 & 2 Vict. c. 110, s. 15, the order operates as a *distringas* upon the stock. [*Lush*, *contra*, cited *Churchill v. Bank of England*, 11 M. & W. 323,† deciding *that, notwithstanding a charging order *904] absolute, the bank is bound to pay over the dividends upon the stock charged to the legal owners, who are responsible in equity for their due application.] *Beavan v. Earl of Oxford*, 6 De G. M. &

G. 507, must be taken to have overruled *Watts v. Porter*, 3 E. & B. 743 (E. C. L. R. vol. 77), which was there much discussed. [CROMPTON, J.—The Court, in *Beavan v. Earl of Oxford*, took a distinction between sects. 13 & 14 of stat. 1 & 2 Vict. c. 110. If the two sections are to be construed differently, *Watts v. Porter* may still be supported under sect. 13.] In the course of his judgment in *Beavan v. Earl of Oxford*, 6 De G. M. & G. 532, Turner, L. J., says, “The decision of the majority of the Court” in *Watts v. Porter* “rested on the ground, as it appears to me, at least, that there was a want of privity which prevented there being any trust in favour of the mortgagee until the mortgagee had given notice to the trustee. But with great deference to that opinion, I apprehend that the equitable interest which was vested in the judgment-debtor passed from him by the assignment to the mortgagee; and that after the mortgagee took that equitable interest the trustee ceased to be a trustee for the judgment-debtor, although it might well be that the mortgagee could not charge the trustee for breach of trust until he had given notice of the mortgage. If, then, the trustee had ceased by the assignment to the mortgagee to be a trustee for the judgment-debtor, to that extent the 14th section of the statute had no application, because that merely applies to stock standing in the name of the judgment-debtor, or of some person or persons in trust for the judgment-debtor.” [BLACKBURN, J.—Those observations must be *taken to refer to a case only in which [*905 the whole beneficial interest of the judgment-debtor has been assigned.] In *Kinderly v. Jervis*, 22 Beav. 1, the Master of the Rolls concurred in the decision in *Beavan v. Earl of Oxford*, and refused to be bound by *Watts v. Porter*.

PER CURIAM.(a)—The rule must be discharged.—The plaintiffs are entitled to retain their charging order; for the defendant appears to have retained an equitable interest in the stock which the order may reach. Even if the defendant's interest is matter of doubt, we ought not, by discharging the order, to deprive the plaintiffs of any rights or remedies which they may have under it. Rule discharged.

(a) Cockburn, C. J., Wightman, Crompton, and Blackburn, Js.

*In the Matter of a Plaint of HACKING v. LEE. [*906
May 22.

By stat. 13 & 14 Vict. c. 61, s. 14, either party to a cause in a County Court, who is dissatisfied with its decision, may appeal against the decision to any of the superior Courts, provided he, within ten days of the decision, gives notice of such appeal to the other party, or his attorney, and also gives security for costs; and, if he be the defendant, for the amount of the judgment. Sect. 15 enacts, “that such appeal shall be in the form of a case agreed on by both parties or their attorneys, and if they cannot agree the Judge of the County Court, upon being applied to by them or their attorneys, shall settle the case and sign it.” Rule 145 of the County Court practice rules, framed by the County Court Judges appointed by the Lord Chancellor for the purpose, under stat. 19 & 20 Vict. c. 108, s. 32, provides that “all cases of appeal shall, unless the Judge shall otherwise order, be presented to him for signature at the Court holden next after the expiration of twelve clear days from the day on which judgment was pronounced, and shall then be signed by the Judge, and be sealed with the seal of the Court;” and if the appellant do not comply with this rule the successful party may proceed on the judgment, unless the Judge shall otherwise order.

Held, that a County Court Judge is bound, on the application of an appellant who has com-

the 145th rule was not to restrain or disable parties from prosecuting an appeal, upon failure to present the case to the Judge for signature, at the specified Court; but merely to prevent the appeal being converted into a means of delay, which result the rule obviates by providing that, in case of delay, the pendency of the appeal shall not operate as a stay of execution. The analogy appears to me to be very strong between proceedings in error from the judgment of a superior Court and those upon an appeal from the judgment of a County Court. We have, further, the direct authority of the decision of the Court of Exchequer, in which I fully concur, on the point before us.

CROMPTON, J.—I am of the same opinion. I think the decision of the Court of Exchequer clearly right. It is very doubtful indeed whether any of the rules of practice framed by the County Court Judges could over-ride the express provisions of stat. 13 & 14 Vict. *c. 61, s. 14;(a) but, however that may be, it is evident that *911] the 145th rule was not intended to have that effect, but was framed merely with a view to speed the course of the proceedings on an appeal; not to deprive an appellant of the right of appeal altogether, on his non-compliance with its requirements.

BLACKBURN, J., concurred.

Rule absolute.

(a) Stat. 12 & 13 Vict. c. 101, s. 12, under which the County Court practice rules formerly in force were framed, expressly provided that the rules, when approved by the Judges of the superior Courts, should be laid before Parliament, and should, after six weeks therefrom, "be of the same force and effect as if the same had been enacted by authority of Parliament." But stat. 19 & 20 Vict. c. 108, s. 32, merely provides that the rules to be framed by the County Court Judges "shall be submitted to the Lord Chancellor, who may allow or disallow, or alter the same: and the" same "so allowed or altered shall, from a day to be named by the Lord Chancellor, be in force in every County Court."

The QUEEN, on the prosecution of the MAIDSTONE Improvement Commissioners, Respondents, v. The Justices of the County of KENT, Appellants. *May 26.*

By local and personal public Acts of Parliament, Improvement Commissioners were appointed to act in and for the town of M. in the county of K., and were authorized to levy annually within the town, for the purposes of the Acts, a certain rate upon, amongst other public buildings, all gaols situated within the town. A subsequent local and personal public Act, 54 G. 3, c. civ., sect. 18, after reciting that it was expedient that the county of K. "should be relieved and exonerated from any taxes in respect of any of the gaols" "of the said county," enacted that "no rate, tax, or assessment whatsoever, parliamentary or parochial," should "be raised, assessed, or levied on, or be payable by, the said county" "for or on account of the said gaols" "or any or either of them."

Held, that this section exempted a county gaol, situated in M., from assessment to the annual rate leviable by the M. Improvement Commissioners.

CASE stated by consent and by order of Wightman, J., after notice *912] of appeal by the appellants to the Kent *Quarter Sessions, against a rate made by the respondents, to which the county gaol of Kent, situate in Maidstone, was assessed.

The appellants are the justices of the county of Kent, acting on behalf of the inhabitants of the said county, and the respondents are the Commissioners for the time being, acting in the execution of certain powers conferred on them by three several Acts of Parlia-

ment, namely, stats. 31 G. 3, c. lxii.,(a) 42 G. c. xc.,(b) and 59 G. 3, c. xvi.,(c) all of which are public Acts.

By stat. 31 G. 3, c. lxii.(a) s. 8, it is enacted as follows: "And for raising money towards answering and defraying the charges and expenses of obtaining and passing this Act, and carrying the same into execution, be it further enacted, that the said Commissioners, or any five or more of them, shall and are hereby authorized and required once in every year to rate and assess any sum not exceeding the sum of one shilling and sixpence in the pound, and no more, upon the several tenants or occupiers of all houses, oasts, buildings, yards, gardens, lands, rents, revenues, tenements, and *hereditaments, within the said town of Maidstone, according to the annual value of the [*913 same respectively, such annual value to be from time to time settled according to the respective rents" the same "shall be respectively taxed at, for the relief of the poor of the said town and parish of Maidstone, previous to the making of such rate or assessment by the said Commissioners.

By sect. 13 of the same Act it is enacted "That the said Commissioners, or any five or more of them, shall, and they are hereby authorized and required once in every year to rate and assess the several and respective sums of money hereinafter mentioned, upon the church in the said town of Maidstone, and the churchyard thereto belonging, and other buildings, tenements, and hereditaments, hereinafter directed to be rated and assessed, by the yard, running measure;" "that is to say, the sum of one shilling and no more, upon the aforesaid church and churchyard, and upon all chapels, meeting-houses, halls, gaols, churchyards, chapelyards, meeting-house yards, alms-houses, hospitals, and other public buildings whatsoever, situated on the sides of, or which form or adjoin to any of the said streets, lanes, passages, and places, hereby directed to be paved, cleansed, lighted, or watched, for every yard, running measure, of the length of the several and respective places aforesaid, which are not rated or liable to be rated for and towards the relief of the poor of the said town and parish."

By sect. 14 of the same Act it is enacted "That the rates or assessments so to be made and laid upon any hall, gaol, public or other building, belonging to the mayor, jurats, and commonalty of the said town, shall be paid by the chamberlain of the said town;" "and the *rates or assessments so to be made and laid upon any gaol not [*914 belonging to the mayor, jurats, and commonalty of the said town, shall be paid by the respective gaolers or keepers thereof."

By sect. 32 of the same Act it is enacted "That the said Commissioners shall and may describe and determine the limits and extent

(a) Local and personal, public. "For widening, improving, regulating, paving, cleansing, and lighting the streets, lanes, and other public passages and places, within the King's town of Maidstone, in the county of Kent, for removing and preventing encroachments, obstructions, nuisances, and annoyances therein; for better supplying the said town with water; and for repairing highways within the parish of Maidstone."

(b) Local and personal, public. "For altering and amending" stat. 31 G. 3, c. lxii, "and for raising a farther sum of money for completing the purposes of" that "Act."

(c) Local and personal, public. "To enlarge the powers of three Acts of His present Majesty, for paving, cleansing, and lighting the streets and other public places" in the town of Maidstone, "and for better supplying the inhabitants with water; and for watching the said town, and making public wharfs therein."

of the several streets, lanes, passages, and places, within the said town, for the purposes of this Act, according to a plan thereof made" "in the year 1790."

Stat. 42 G. 3, c. xc., (a) sect. 3, repeals the above-mentioned provision in sect. 32 of the first Act, and enacts, in lieu thereof, "That it shall be lawful for the said Commissioners, and they are hereby required to describe and determine the limits and extent of the several streets, lanes, passages, and places, within the said town, for the purposes of the" first "Act, according to the actual extent thereof, notwithstanding the same may not be included in or according to the said plan; provided that such limits shall in no case be deemed to extend to any greater distance from the now town hall of the said town of Maidstone, than three quarters of a mile; and such Commissioners shall and may thereupon proceed to the exercise of, and putting in force, the several powers of the said first" "Act, and do and perform, and cause to be done and performed, all acts, matters, and things, for the carrying into effect the purposes of the said first" "Act, within the limits and extent described and determined under and by virtue of this Act, in like manner as if the same had been described and determined under the said Act."

*915] "By stat. 54 G. 3, c. civ., (b) s. 18, it is enacted as follows, "And whereas it is expedient that the said county shall be relieved and exonerated from any taxes in respect of any of the gaols, houses of correction, and court-houses, of the said county; be it therefore enacted that, from and after the passing of this Act, no rate, tax, or assessment whatsoever, parliamentary or parochial, shall be raised, assessed, or levied on, or be payable by, the said county of Kent, for or on account of the said gaols, houses of correction, and court-houses, or any or either of them, or any part thereof."

The county gaol of the county of Kent was built, in the year 1815, on a rectangular piece of ground, containing about twelve acres, and is wholly situated within three quarters of a mile from the town hall of the said town of Maidstone. When the gaol was first built it was at the north-eastern extremity of Maidstone, and not within what would then have been called the town; but since its erection the town has extended considerably, and the ground surrounding the gaol is now in a great measure occupied by houses and buildings.

A ground plan of the gaol and other buildings, showing the adjoining roads, accompanied the case. These roads are public highways, and are repaired and lighted by the respondents out of their public funds.

Under the provisions of the three first-mentioned Acts, the respondents had assessed upon the county *gaol at Maidstone, 52*l.* 16*s.*, *916] a sum of money calculated at the rate of 1*s.* per yard, running measure, of the exterior wall or boundary of the gaol. The appellants contended that, by virtue of stat. 54 G. 3, c. civ., s. 18, above set out, the gaol is exempted from the said assessment.

(a) Local and personal, public. "For altering and amending" stat. 31 G. 3, c. lxii.; "and for raising a further sum of money for completing the purposes of" that "Act."

(b) Local and personal, public. "For enabling the justices of the peace for the county of Kent to hold a general Sessions annually, or oftener, for levying and applying the rates and expenditure of the said county; and to alter and amend an Act made in the forty-ninth year of His present Majesty, for regulating the rates of the said county."

If the Court should be of opinion that the gaol was exempted from assessment, the rate appealed against and the order of Sessions were to be quashed; if the Court should be of the contrary opinion, they were to stand confirmed.

Deedes, for the respondents.—The county is liable to this rate in respect of the gaol. In order to avoid that liability, express exemption from the rate, under some statute, must be shown. But the only statute upon which the appellants can rely for that purpose is 54 G. 3, c. civ. s. 18, (a) the words of which fall short of the effect contended for. The rate in dispute is not a “rate, tax, or assessment” “parliamentary or parochial,” within the meaning of that enactment. It is not a parliamentary tax, not being imposed directly by Act of Parliament: *Palmer v. Earith*, 14 M. & W. 428;† and, moreover, not being levied for general purposes of state. In *Guardians of Bedford Union v. Commissioners of Bedford*, 7 Exch. 777,† it was held that a workhouse, erected in Bedford under the provisions of a local Act which enacted that all buildings so erected should be “free from all parochial and parliamentary taxes,” was liable to be assessed under another local Act, which imposed an improvement-rate on public buildings in Bedford. *Baker v. Greenhill*, 3 Q. B. 148 (E. C. L. R. vol. 48), shows that *a rate raised and levied under an Act [*917 empowering a class of persons liable, at common law, to the charge to levy it amongst themselves, is not a parliamentary tax. [COCKBURN, C. J.—May not the words “parliamentary or parochial,” following as they do the words “no rate, tax, or assessment whatsoever,” be regarded as words of amplification, rather than as restricting the generality of the preceding words?] They explain the description of rate, tax, or assessment to which the preceding words refer. Again, the rate in question is not a parochial tax. In *Rex v. Christ Church*, 8 B. & C. 660 (E. C. L. R. vol. 15), the watch-rate in the city of London was held not to be a parochial public tax or levy. So, in *Waterloo Bridge Company v. Cull*, 1 E. & E. 213 (E. C. L. R. vol. 102), (b) the land-tax was held not to be a parochial rate or assessment. [CROMPTON, J.—May not the rate in the present case be a parliamentary rate, even if it be not a parliamentary tax?] The mere fact that the authority under which the rate is ultimately made is Parliament, is not enough to make it a parliamentary rate. The other side may rely upon *Waller v. Andrews*, 3 M. & W. 312,† and *Williams v. Pritchard*, 4 T. R. 2; but the words upon the construction of which those decisions respectfully turned were much wider than those of stat. 54 G. 3, c. civ., s. 18.

Barrow, for the appellants.—The county is exempt from this rate, which, if not a parliamentary tax, is at all events a parliamentary rate, within the very wide language of stat. 54 G. 3, c. civ., s. 18, the enacting part of *which must be read with reference to the [*918 preamble, which recites that it is expedient that the county should be relieved from “any taxes” in respect of its gaols. *Waller v. Andrews*, 3 M. & W. 312,† is strongly in point for the appellants. In that case it was held that a sewer’s-rate imposed, not directly by Parliament, but by Commissioners deriving their authority under an

(a) Ante, p. 915.

(b) Judgment affirmed in the Exchequer Chamber, p. 245.

Act of Parliament, fell within the meaning of a condition in a demise of marsh lands, which bound the lessee to pay and discharge "all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary," which were and should be charged or chargeable upon the lands. In delivering the judgment of the Court, Parke, B., said, "Though the authority of Lord Holt^(a) raises a doubt whether this could be properly considered as a *parliamentary* tax, and therefore, if the words 'parliamentary taxes' only had been mentioned, it might have been questionable whether the sewer's-rate was included, yet, when such very extensive words as those in the agreement are used, that is, 'all outgoings, rates, and scots,' which last word is *commonly* applied to sewer's-rates *on marsh lands*, we think that the sewer's-rate is included. It is a 'scot,' and would be comprised in the terms 'all *parliamentary* scots,' though not perhaps properly and technically so, as not being imposed directly by Parliament, but by Commissioners deriving their authorities under an Act of Parliament." The occurrence of the word "whatsoever" immediately before "parliamentary *919] or parochial," in stat. 54 G. 3, c. civ., s. 18, distinguishes the present case from *Palmer v. Earith*, 14 M. & W. 428,† and *Guardians of Bedford Union v. Commissioners of Bedford*, 7 Exch. 777;† and shows that the words "parliamentary or parochial" must be read as equivalent to "even parliamentary or parochial." Parke, B., in his judgment in *Palmer v. Earith*, points out that the words of the agreement there to be construed, namely, "all taxes, parochial and parliamentary, to be paid by the said tenant," were much less extensive than those in *Waller v. Andrews*, 3 M. & W. 312,† where the tenant agreed to pay "all outgoings whatsoever." *Palmer v. Earith* decides merely that a sewer's-rate is not a parliamentary tax; not that it may not be a parliamentary rate: for "rates" were not mentioned in the agreement there in question. So in *Guardians of Bedford Union v. Commissioners of Bedford* the words of the statute to be construed were, merely, "free from all parochial and parliamentary taxes;" and Alderson, B., pointed out the distinction between them and the language of the statute in question in *Williams v. Pritchard*, 4 T. R. 2, namely, "free from all taxes and assessments whatsoever." The exempting clause of the statute in the present case exonerates the county, in respect of any of its goals, from every "rate, tax, or assessment whatsoever;" language than which nothing can be wider. *Baker v. Greenhill*, 3 Q. B. 148 (E. C. L. R. vol. 43), does not apply. All that was there decided was that an assessment levied under an Act enabling the owners of land to raise money for repairing a bridge, to repair which they were liable *ratione tenuræ*, is not a parliamentary tax; if indeed it can properly be said to be a tax at all.

Deedes was heard in reply.

*920] *COCKBURN, C. J.—I am of opinion that our judgment must be for the appellants. Independently of authority we should have no doubt as to the construction to be put upon stat. 54 G. 3, c. civ., s. 18. Looking as well at the preamble as at the enacting clause of the section, it clearly was the intention of the Legislature to relieve

(a) In *Brewster v. Kitchel*, 2 Salk. 615, where he says: "There be other taxes not parliamentary, as repair of churches, commission of sewers."

the county, in respect of its gaols, from all taxes, rates, and assessments whatsoever: whether parochial, local, parliamentary, or otherwise. The words of the enactment are as wide as possible. Mr. *Deedes* argued that "parliamentary or parochial" are words of limitation upon those which precede, "no rate, tax, or assessment whatsoever;" and that the rate in question, which is clearly not parochial, is not parliamentary, because not levied immediately under the authority of an Act of Parliament, without the intervention of an assessment; and also because not levied for purposes of state. There may be cases in which the words "parliamentary tax" are not intended to include anything but a tax imposed directly by an Act of Parliament. *Palmer v. Earith*, 14 M. & W. 428,† is an instance. But the decision in each case must turn upon the particular phraseology of the enactment or document to be construed, and upon the intention to be collected therefrom, having regard to the subject-matter and circumstances to which it is applicable. I doubt whether the rate in question in the present case is not a parliamentary tax or rate in every sense of the words: but at all events it is evident, from the very wide language of the enactment before us, that it was intended to exempt the county from rates and taxes of any kind in respect of the county gaols. The insertion of the word "whatsoever" [*921 has been held, in several of the cases to which we have been referred, to make a great difference in the interpretation of an exempting clause, and to enlarge its operation. And certainly, taking the whole of the words here employed by the Legislature together, they are quite wide enough to exempt the appellants from this rate.

WIGHTMAN, J.—The 18th section of the statute, after reciting that it is expedient that the county should be relieved from any taxes on its gaols, enacts that the county shall be liable, in respect of the gaols, to "no rate, tax, or assessment whatsoever, parliamentary or parochial." The words "no rate, tax, or assessment whatsoever" would clearly include the present rate. But it is argued that "parliamentary or parochial" are words of limitation upon those which precede. I think, however, that they are words of amplification, not of qualification or restriction; and that they were put in by the Legislature as being the most wide and comprehensive that could be used. None of the cases cited are exactly in point. They all turned, necessarily, upon the particular phraseology which had to be construed in each of them. The language used, and the circumstances to which it is to be applied, must be regarded in each individual case. Having regard to those in the case before us, I think that it clearly was the intention of the Legislature to exempt the appellants from the rate now in dispute.

CROMPTON, J.—On first reading the section I thought that the intention of the Legislature to exempt the county from all such burdens as the rate in question was tolerably *clear. I was [*922 afterwards shaken in this impression by the authorities cited by Mr. *Deedes* as showing that the rate is not a parliamentary tax, not being imposed by the direct authority of Parliament. Those cases, however, turned upon the particular language presented for construction in each of them, and are far from conclusive in favour of the present respondents. The word "whatsoever" has been held

to enlarge the operation of an exempting clause; and, according to *Waller v. Andrews*, 3 M. & W. 312,† a rate imposed by persons acting under the authority of an Act of Parliament may fall within the description of a parliamentary rate, although it be not imposed directly by Parliament itself. In the present case, the occurrence of the word "assessment" in the enactment is in favour of such a construction; inasmuch as Parliament does not directly assess those who pay rates or taxes, but leaves that function to other persons. Then, again, the preamble of the section may be used as the key to the enacting clause; and the words "any taxes" in the former, expanded into "no rate, tax, or assessment whatsoever, parliamentary or parochial," in the latter, are amply sufficient to include the present rate.

BLACKBURN, J.—I am of the same opinion. The question turns entirely upon the construction of the particular enactment which has been referred to; and, looking at the language of the preamble and the enacting clause, the construction clearly ought to be in favour of the appellants.

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The parties to cross-actions, the plaintiff in each of which had obtained judgment, bona fide compromised the actions, after notice to one of them and his attorney from the attorney of the other not to do so in prejudice of the latter's lien on his client's judgment. Held, that the attorney had no ground for claiming the equitable interference of the Court to enforce his lien. *Braddon v. Allard*, 19

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O. & S., bankers at B., being in want of funds to meet an expected run upon their bank, obtained from some friends a written guarantee for 3000*l.*, upon the strength of which defendants, bankers in London, advanced to O. & S. 3000*l.* The guarantee, S. stated in evidence, was signed by the sureties on the understanding with O. & S. that the money should be returned if they found themselves, notwithstanding the advance, unable to meet the run. Defendants knew nothing of this understanding. S. having received from defendants at London the 3000*l.* in notes and gold, in a box, took the money down to B., and saw O., his partner; and, finding that it was impossible to meet the run, O. & S. discussed the propriety of returning the money. While discussing it they received a letter from F., one of the sureties, saying that, as the case was hopeless, O. & S. could not honourably retain the money, and that it ought to be returned: and F. afterwards, in an interview, again urged upon them the return of the money. S., in evidence, stated that this letter and the subsequent application from F. operated upon their minds in coming to the conclusion to return the money. The box containing the money was returned to the defendants unopened: O. & S. suspended payment the next day, and afterwards became bankrupts.

In an action by the assignees of O. & S. to recover from the defendants the 3000*l.*;

Held (on a special case stating the facts), that O. & S., in returning the money, were influenced not solely by their own wish, but also by the application from the surety: and that therefore the return of the money was

not purely voluntary, and did not amount to a fraudulent preference.

Held also, by Erle and Crompton, Js., that the 3000*l.* was advanced on the specific understanding, and clothed with the specific trust, that it should be returned if the run could not be met; that, as the purpose for which it was advanced had failed, O. & S. had only a legal, and not also an equitable, title to the money: and that therefore the interest in such money did not pass to their assignees. *Edwards v. Glyn*, 29

2. Notice of act of bankruptcy committed by execution-debtor, given to agent of attorney of execution-creditor, after seizure and before sale, by such agent, of judgment-debtor's goods, under *fi. fa.* Bankruptcy of execution-debtor. Rights of his assignees.

On 22d November, 1858, a *fi. fa.* was put into the premises of W., a trader, on a judgment obtained by B. (the now defendant) in an action of B. *v.* W. On 23d November W. committed an act of bankruptcy, by absenting himself. On 24th November the goods seized under the *fi. fa.* were advertised for sale by auction, and two creditors of W., on the same day, gave a written notice to the auctioneer and the sheriff's officer in possession, that W. had committed an act of bankruptcy. On the same day, U., an attorney, who had acted as agent for P. & S., B.'s attorneys in the action, in the service of the writ of summons upon W., was informed by the attorney of the two creditors that W. had committed an act of bankruptcy. P. & S. on the same day wrote to U. the following letter, headed "B. *v.* W." "The sheriff is in possession here, and we have expected that bankruptcy would ensue. We saw defendant last evening, and as he did not appear to contemplate such a step, we think it desirable to endeavour to get an assignment from the sheriff, as we should then have an opportunity of disposing of the stock, &c., to the best advantage. We will therefore thank you to see the officer; and if an inventory has been taken, the matter could be readily completed. You will be good enough to let this have your immediate attention, as if anything is to be done it must be done quickly." On 25th November, and after the receipt of this letter, U. was told, both by the auctioneer and by the sheriff's officer, that notice of an act of bankruptcy by W. had been served on them. U., however, then directed the officer to get a bill of sale of the goods executed by the sheriff to B. After this, on the same day, U. wrote to P. & S.; "I fear my services have been called in when too late," "although, I believe, no petition has been presented as yet." The bill of sale of the goods to B. was executed by the sheriff on 26th November. On a later hour of the same

day a petition in bankruptcy was filed against W., and, on 27th November, W. was adjudicated bankrupt. U. caused the goods to be sold on 13th and 14th December following.

Held, that U., upon the receipt of P. & S.'s letter of 24th November, became B.'s agent to conduct the execution, with a discretion as to the manner of conducting it; that notice after that to U., of an act of bankruptcy by W., was notice to B.; that U. had such notice before the execution was completed by sale; and that, therefore, W.'s assignees in bankruptcy were, by reason of The Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106, s. 133), entitled to recover against B. in an action of trover for the goods. *Brewin v. Briscoe*, 116

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On 11th November, 1857, A. assigned to defendant the cargo of a ship belonging to A., and then supposed, both by him and defendant, to be about to set sail for England with the cargo, from the West Coast of Africa. Had defendant sent to the master of the ship in Africa, early notice of the assignment, it would have reached him there before 12th February, 1858, the day on which the ship actually set sail thence on her homeward voyage. Defendant, however, did not send the notice till 23d January, 1858, and the notice then sent never reached the master. On 1st March, 1858, A. became bankrupt. On 14th April, 1858, the ship arrived in England; and on the same day the master, who then first had actual notice of the assignment, delivered the cargo to defendant, notwithstanding a demand of it by A.'s assignees in bankruptcy.

Held, that defendant, not A.'s assignees in bankruptcy, was entitled to the cargo; for that it was not in the possession, order, or disposition of A. at the time of his bankruptcy, with the consent of the true owner, defendant, within stat. 12 & 13 Vict. c. 106, s. 125, the facts of the case showing that defendant was guilty of no laches in omitting to send the master of the ship earlier notice of the assignment.

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Stat. 1 & 2 Vict. c. 110, s. 92, directs that it shall be lawful for the Insolvent Debtors' Court, if there be a surplus after the satisfaction of all an insolvent's debts, to make an order vesting such surplus in the insolvent, or his heirs, executors, administrators, or assigns.

A party applied to the Insolvent Debtors' Court for an order to vest such a surplus in him, under this section; claiming under an alleged assignment to him by the insolvent. That Court, upon inquiry, held that the assignment was invalid as against other claimants of the surplus, and refused to make the order. The Court of Queen's Bench, holding that the functions of the Insolvent Debtors' Court under the section in question were judicial and not merely ministerial, refused to issue a mandamus commanding that Court to make the order. The applicant then took proceedings in Chancery, which resulted in a decree in his favour, that the assignment to him by the insolvent was valid. The Court of Chancery further expressed an opinion that this decree rendered the duty of the Insolvent Debtors' Court in the matter simply ministerial. The latter Court, however, refused, on a renewed application to it, to act upon that opinion and make the order.

On a subsequent application now made by the claimant to the Court of Queen's Bench for a mandamus to the Insolvent Debtors' Court to make the order, held: that after

as before the proceedings in Chancery, and notwithstanding the opinion there expressed to the contrary, the Insolvent Debtors' Court retained a judicial discretion whether or not to make the order; and that therefore the mandamus could not issue. *Ex parte Cook*, 586

BASTARD CHILD.

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At the trial, it was proved that plaintiff gave time to T., as stated in the pleas, and the jury found that defendant was surety, as between himself and T., and that plaintiff knew it, but did not agree, nor did defendant stipulate, that defendant should be treated by plaintiff as surety or otherwise than as a maker of the note.

On a case stated for the opinion of the Court, whether on this finding the pleas were proved: Held, that they were; and that *Pooley v. Harradine*, 7 E. & B. 431 (E. C. L. R. vol. 90), was conclusive in defendant's favour.

Judgment affirmed in the Exchequer Chamber, where held that defendant's right to relief, in equity, arose from the existence of the relation of surety and principal between defendant and T., and from plaintiff's knowledge thereof at the time he took the note; that, therefore, the fact that plaintiff had not agreed to treat defendant as surety did not debar defendant from such relief. *Greenough v. McClelland*, 424

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(18 & 19 Vict. c. 128.)

Sects. 12, 13. Appointment, by parish vestry, of Burial Board for the parish minus an ecclesiastical district. Validity of rate by such Board, and assessability thereto of hamlet situate in the part of the parish for which the Board is appointed.

By stat. 18 & 19 Vict. c. 128, s. 12, it is enacted that "the vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a Burial Board." And, by sect. 13, the Burial Board of "any district (whether a parish or township or other subdivision) not separately maintaining its own poor, but forming part of a parish maintaining its own poor," "by means of a common rate," may require the overseers of the parish to defray the expenses of the board; and the necessary sums may be levied "by an addition to the" "common rate, so far as the same affects the district in respect of which such payments are required, or by separate rates to be made from time to time on such district." Prior to this statute, the parish of "M." included T. W., an ecclesiastical district formed under stat. 58 G. 3, c. 45, and S., a hamlet containing a church, to which a district had been assigned under stat. 1 & 2 W. 4, c. 88. Neither T. W. nor S. separately maintained

their own poor (there being a common poor-rate for the entire parish of T.), but each had its separate burial ground.

A vestry meeting "of the inhabitants of the parish of T." was called, by notice affixed to the doors of all the churches in the parish, including that at S., but excluding those in T. W., to consider whether a burial ground should be provided for such part of the parish of T. as was not included in T. W., and, if so, to appoint a Burial Board for such part of the parish.

A Burial Board for T., excluding T. W., was appointed at this meeting. Held, that the Board was well appointed; that a poor-rate made on that part of T. for which such Board was appointed, for defraying the expenses of the Board, was good; and that occupiers of property in S. were properly assessed to the rate; for that though T. W. was entitled to a separate Burial Board, S. was not. *Viner v. Overseers of Tonbridge*, 9

CALLS.

COMPANY, I.

CARRIER.

Liability of common carrier to distinct actions of tort and of contract for loss of goods intrusted to him as such, 844. Costs, L. 5.

CENSUS.

Report of Registrar-General on Census of 1851, 557. EVIDENCE.

CERTIFICATE.

Judge's, for costs, under Small Debts Extension (City) Act. What a waiver by defendant of objection to it as not having been granted forthwith, 671. SMALL DEBTS COURT.

CHARGING ORDER.

Under stat. 1 & 2 Vict. c. 110, s. 14. What interest of judgment-debtor in public stock is chargeable.

Stat. 1 & 2 Vict. c. 110, s. 14, provides that stock in the public funds "standing in" the "name" of a judgment-debtor "in his own right, or in the name of any person in trust for him," may be charged by Judge's order with payment of the amount of the judgment-debt and interest. Stat. 3 & 4 Vict. c. 82, s. 1, extends this provision to "the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent," in such stock.

Held, that the contingent reversionary life interest of a judgment-debtor in the surplus, if any, of stock standing in the name of trustees, and assigned by him to another set of trustees on trust to sell it and pay his

debts to a named amount, with a resulting trust, as to the surplus after such payment (subject to the present life interest of another person therein), in favour of the debtor, is chargeable under these enactments, notwithstanding the doubtful nature of the interest and the uncertainty as to its extent. *Baker v. Tynte*, 897

CHARTER.

Of University of London, 133. UNIVERSITY, I.

CHARTER-PARTY.

PRINCIPAL AND AGENT, II.

CHURCH DISCIPLINE ACT.

(3 & 4 Vict. c. 86.)

Sect. 3. Discretion of Bishop to refuse to issue commission to investigate charges preferred by a clerk in holy orders, unconnected with the diocese, against the rector of a parish in the diocese.

G., a clerk in holy orders, residing in the city and diocese of O., applied to the Bishop of C. to issue a commission, under stat. 3 & 4 Vict. c. 86, s. 3, against R., rector of the parish of W., in the diocese of C., to inquire into certain charges made by G. against R. of offences against the laws ecclesiastical. G. had no connection with the parish of W. or diocese of C., nor had he any private or personal interest in the said charges. The Bishop declined, after inquiry, to issue a commission.

Upon the showing cause against a rule for a mandamus to the Bishop, commanding him to issue a commission:

Held, by Lord Campbell, C. J., Wightman and Erle, Js. (dubitante Hill, J.), that, under the statute, the Bishop had a discretion as to issuing a commission or not.

Held further, by all the Court, that, as it was in the discretion of the Court to grant a mandamus or not, the mandamus ought not to issue upon the application of one who was a stranger to the parish and diocese, and had no personal interest in the investigation of the charges. *Regina v. Bishop of Chester*, 209

CHURCH-RATE.

RATE, V.

CLERK.

Articled clerk of attorney, gains a settlement as an apprentice, 742. POOR, I. 1.

COCK-FIGHTING.

STATUTE, III.

COLLECTOR OF POOR-RATE.

Liability of surety for. PRINCIPAL AND SURETY, II. 2.

COLLIERY..

Penalty when incurred by colliery agent, under stat. 18 & 19 Vict. c. 108, s. 11, for breach of rule 1 in sect. 4. Meaning of "worked" in sect. 11.

Stat. 18 & 19 Vict. c. 108, s. 4, requires certain rules to be observed, in every coal-mine and colliery, by the owner and agent thereof. By rule 1, "an adequate amount of ventilation" is to "be constantly produced at all collieries" in order "that the working-places of the pits and levels of such collieries" may "under ordinary circumstances be in a fit state for working." Sect. 11 imposes a penalty upon the owner and agent "if" "any" "colliery be worked," and the aforesaid rules are neglected or wilfully violated.

Held, that the agent of a colliery which was actually worked only on week days, incurred a penalty under sect. 11 for a breach of rule 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night and Monday morning; for that, notwithstanding such suspension, the colliery was "worked" during that time within the meaning of that section. *Knowles v. Dickinson*, 705

COMMON LAW PROCEDURE ACTS.

I. 1852. (15 & 16 Vict. c. 76.)

Sect. 180, Sched. (A) Form No. 17. Ejectment. Verdict how entered, where plaintiff succeeds as to part only of the land claimed in the writ.

Where the defendant in ejectment appears to defend for the whole of the land mentioned in the writ, and the plaintiff at the trial proves his title to the possession of part only of the land, the verdict is not to be entered in a general form for the plaintiff, but for the part only of the land as to which he succeeds; according to sect. 180 of The Common Law Procedure Act, 1852, and Schedule (A) to that Act, Form No. 17. *Alcock v. Willshaw*, 633

II. 1854. (17 & 18 Vict. c. 125.)

Sects. 5, 32. Error does not lie on special case stated under sect. 5 by an arbitrator; notwithstanding sect. 32.

The Common Law Procedure Act 1854, 17 & 18 Vict. c. 125, s. 5, provides that "it shall be lawful for" an "arbitrator," upon a reference by consent where the submission may be made a rule of Court, "if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of

the Court." By sect. 32, "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary."

A cause and other matters in difference were referred by consent, by order of Nisi Prius. The order contained no clause relating to the statement of a special case by the arbitrator; but it provided that the parties should not bring error against him or each other, respecting the matters referred. In pursuance of sect. 5 the arbitrator, at the request of the parties, stated his award, as to the cause only, in the form of a special case for the opinion of this Court; and the Court gave judgment thereon for defendant.

Held, first, that plaintiff could not, under sect. 32, bring error upon this judgment; the opinion of the Court on a special case stated under sect. 5 being merely an ancillary proceeding to the award, which the arbitrator has still to make; not a judgment of the Court as a tribunal, as the judgment upon a special case stated instead of a special verdict is. Secondly that, independently of the statute, plaintiff was precluded by express agreement from bringing error. *Gumm v. Fowler*, 890

COMPANY.

I. Joint Stock Company.

1. Liability of subscriber to Parliamentary subscription contract of Company requiring an Act of Parliament, to pay his subscription, though the Company is not completely registered and the application to Parliament is abandoned. Equitable plea. What are "calls" by the Company.

Declaration on a covenant by defendant, as a subscriber to a projected railway Company, with plaintiffs, the trustees named in the deed, to pay them the amount of defendant's subscription, in such sums as should be required by the provisional directors. The declaration set out certain clauses in the deed, which was the ordinary subscription contract required by the standing orders of Parliament, the Company having applied to Parliament for an Act. One of these clauses gave a discretion to the provisional directors to abandon the application to Parliament. Averment, that the provisional directors had required from defendant payment of part of his subscription. Breach, non-payment thereof.

Plea 2, on equitable grounds: that the sum sued for was in respect of a deposit to be paid on shares in the intended Company, and that, before any claim upon defendant for payment, and before suit, the scheme was wholly abandoned by the provisional directors. Plea 4: that the Company was not provisionally or completely registered at the

time of suit, and that plaintiffs brought the action as trustees for the Company, to enforce payment by defendant of a deposit on shares in the capital of the Company. Plea 5: that the Company was never completely registered, and that plaintiffs brought the action as trustees for the Company, to enforce payment by defendant of a call, in respect of the sum subscribed by him, upon shares in the capital of the Company.

Demurrers, and joinders in demurrer.

On appeal to the Exchequer Chamber from the judgment of the Court of Queen's Bench, holding all the pleas to be bad: held, by the majority of the Court (Pollock, C. B., Willes, J., Martin, Watson, and Channell, B.), affirming that judgment, that all the pleas were bad. The 2d plea, because it did not allege that the sum sued for was sought to be recovered for any other purpose than to pay preliminary expenses incurred before the abandonment of the scheme; whereas it was the object of the Parliamentary subscription contract to provide for the payment of such expenses, and that object was not rendered illegal by stat. 7 & 8 Vict. c. 110. The 4th plea, because the sum sued for was not a deposit the recovery of which was prohibited by stat. 7 & 8 Vict. c. 110, s. 23; and because it was consistent with the plea that the Company was provisionally registered when the defendant was called upon to pay, and it was immaterial, if so, whether or not the provisional registration had subsequently expired. The 5th plea, because it did not show that the sum sued for was a call of the character forbidden by stat. 7 & 8 Vict. c. 110, s. 23, or was other than an instalment due from defendant towards the preliminary expenses, under the subscription contract.

Held, by Cockburn, C. J., and Crowder, J., while agreeing with the majority of the Court as to the 2d and 4th pleas, that the 5th plea was good, and the judgment of the Court of Queen's Bench ought to be reversed as to that plea; the plea alleging, and the demurrer admitting, that the sum sued for was a call, and calls being prohibited generally by stat. 7 & 8 Vict. c. 110, s. 23. *Aldham v. Prown*, 398

II. Railway Company.

Register of shareholders. Right of bona fide purchaser from fraudulent holder of stock to be upon it. Validity of transfer by holder registered under feigned name.

By the Acts of Parliament incorporating and regulating defendants, a railway Company, they were required to keep a register of the proprietors of stock in the Company; each proprietor was empowered to transfer his stock by a prescribed form of transfer, executed by the transferrer and the transferee; and each transfer was to be registered

by defendants, the transferee to take no interest until such registration.

A judgment obtained by defendants against one Mary Anne Irving, a widow, in May, 1857, being still unsatisfied, she in the following October furnished a married woman, named Dunlop, with money to buy stock for her in defendants' Company. On 14th October, Dunlop bought the stock, and took and signed a transfer of it, which was in due form, in the name of Ann Watson, widow. Defendants registered this transfer, and transferred the stock into that name. On 29th August, 1858, Dunlop, by Irving's directions, resold the stock in the name of Watson. Plaintiffs then purchased it bona fide, and in the belief that Dunlop's name was Watson, and that she was a widow. A formal transfer from Dunlop, by that name and description, to plaintiffs was, on 10th September, 1858, registered by defendants, and the stock transferred into plaintiffs' names. Dunlop paid over to Irving the money received from plaintiffs for the stock. Both in the original purchase and in the resale, Dunlop acted without her husband's knowledge or intervention, and in collusion with and for the sole benefit of Irving, in order to prevent defendants from satisfying their judgment. Defendants believed both transactions to be bona fide, and that Dunlop was the person whom she represented herself to be. On 6th September, 1858, Irving, who had not then received from Dunlop the money paid by plaintiffs for the stock, petitioned the Insolvent Court, and the next day that Court made a vesting order. On 17th September, 1858, defendants first discovered the real state of facts. On 21st October, 1858, they cancelled the entry in their books of the transfer of the stock to plaintiffs, and transferred the stock into the name of Irving's assignee appointed by the Insolvent Court. Thereupon plaintiffs brought this action, in which they claimed a mandamus to defendants to register the transfer to them, and to enter their names as proprietors of the stock.

On a case stated, after writ and without pleadings, setting out the above facts: held, that plaintiffs were entitled to be replaced on the register, no fraud on their part being shown, and they having a title (whether legal or merely equitable was immaterial) to the stock. That their names, having been once placed by defendants on the register, were not removable therefrom at the mere will of defendants, but only on proof (of which there was none) of a better title in some other person. *Ward v. South Eastern Railway Company*, 812

COMPENSATION.

Given by statute, to persons sustaining injury from the execution of works authorized by

the statute. When it is payable, and when not, 435. **WATERWORKS CLAUSES ACT, 1847.**

CONDITION PRECEDENT.

COUNTY BRIDGE.

CONSTABLE.

When not bound to apprehend, without a warrant, a person charged with an offence against the Vagrant Act, 674. **VAGRANT ACT.**

CONTRACT.

I. Contracts within the Statute of Frauds.

1. Guarantees.

Necessity for the names of all the parties to a guarantee to appear on its face, 349. **STATUTE OF FRAUDS, I. 1.**

2. Other contracts. STATUTE OF FRAUDS.

II. Failure of consideration. Action by vendee of bills for money had and received.

Purchase of unaccepted bills from drawers.

Refusal of drawees, a firm in partnership with drawers for a particular purpose, to accept. Proof in bankruptcy by purchaser against estate of drawees, and receipt of dividends thereupon. Money had and received by purchaser against drawees, for the balance of the purchase-money, unsustainable, 497. **PARTNERSHIP.**

III. Parliamentary subscription contract of projected Company. COMPANY, I.

CONVICTION.

Sufficiency of form of conviction by Metropolitan Police Magistrate, for the offence of endeavouring by threats to force a workman to depart from his hiring. **STATS. 6 G. 4, c. 129, s. 3; 2 & 3 Vict. c. 71, s. 48.**

Stat. 6 G. 4, c. 129, s. 3, enacts that "if any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work," "every person so offending," "being convicted thereof in manner hereinafter mentioned," shall be imprisoned, with or without hard labour, for not more than three calendar months. The form of conviction given in the Schedule to the Act runs thus: "A. B. is convicted" "of having [stating the offence] contrary to the Act," &c. The Metropolitan Police Act, 2 & 3 Vict. c. 71, s. 48, enacts that "in every conviction for an offence contrary to any statute or statutes, it shall be sufficient if the offence shall be stated in the words of the statute declaring the offence, or attaching any penalty thereunto."

A conviction under stat. 6 G. 4, c. 129, s. 3, by a Metropolitan Police magistrate, stated that W. P. was convicted "of having" "unlawfully, by threats, endeavoured to force one W. J., who was then and there a workman hired in his trade and business of a mason by T. P., to depart from his said hiring, contrary to the Act," &c.

Held that, by reason of the enactment in the Metropolitan Police Act above mentioned, this conviction was sufficient, as it stated the offence in the words of stat. 6 G. 4, c. 129, s. 3; although it did not set out the threats which were used, or allege to or against whom they were uttered. And, *semble*, that the conviction was valid, irrespective of the provisions of The Metropolitan Police Act. *Ex parte Perham*, 383

CORPORATION.

Continued employment, not under seal, by new, of attorney retained under seal by old, corporation, 192. **STATUTE, I.**

COSTS.

I. Right to.

1. Plaintiff suing in formâ pauperis and obtaining verdict and Judge's certificate, is disentitled to costs in respect of counsel's and attorney's fees. Principle on which costs are taxed not matter of error.

By reason of stat. 11 Hen. 7, c. 12, and Reg. Gen. Hil. 1853, r. 121, where a plaintiff sues in formâ pauperis, and obtains a verdict and the Judge's certificate for costs, whatever be the amount recovered, nothing is to be allowed on taxation of costs in respect of fees to the plaintiff's counsel, or by way of remuneration for the services of the plaintiff's attorney.

In a case where the Court had previously so held, the Court now refused an application by the plaintiff for a rule to enter a suggestion on the roll to deprive the plaintiff of costs; the object of the application being that error might be brought on the former decision, and the Court holding that error could not be brought. *Dooly v. Great Northern Railway Company*, 576

2. Waiver by defendant of objection that Judge's certificate to give plaintiff costs, under Small Debts Extension (City) Act, was not granted forthwith, 671. SMALL DEBTS COURT.

3. Liability of succeeding overseers to costs of appeal to Quarter Sessions against poor-rate, in which their predecessors were respondents. Enforcement of order of Sessions for payment of such costs, by Judge's order, under stat. 12 & 13 Vict. c. 45, s. 18, to remove it into Q. B.

On 22d September, 1858, a poor-rate for the parish of F. was made by the overseers of

F. Notice of appeal to the next Epiphany Sessions against this rate was given by persons assessed to it. At those Sessions the appeal was, at the instance of the respondents, the overseers of F., adjourned to the next Sessions, and full costs up to the time of the adjournment were ordered to be paid by the respondents to the appellants. On 26th March, 1859, the respondents, having discovered that the rate was invalid, gave notice to the appellants that the appeal would not be opposed at the next Sessions. On 29th March, 1859, the overseers of F. went out of office, and successors to them were appointed. The next Sessions were held on 4th April, 1859, when, no one appearing for the respondents, the appeal was allowed, the rate quashed, and an order made requiring the respondents to pay full costs to the appellants, to be taxed by the clerk of the peace. These costs were taxed at an amount which included the costs incurred up to the Epiphany Sessions. In December, 1859, the appellants demanded payment of this amount from the overseers who had succeeded the original respondents, which was refused. In March, 1860, the appellants obtained, ex parte, a Judge's order, under stat. 12 & 13 Vict. c. 45, s. 18, to remove the order of Sessions into this Court, to be enforced.

On an application to this Court on behalf of the succeeding overseers, after they had gone out of office, for a rule calling on the appellants to show cause why the order of Sessions and the Judge's order should not be set aside: held, that both orders were good upon their face, and could not be questioned on any other ground than that of defects apparent on their face; and that, therefore, whether or not the orders could ultimately be enforced against the present applicants (a point on which the Court gave no opinion), the rule could not be granted. *Ex parte Overseers of Fletton*, 712

4. Reference of all matters in difference; costs of reference and award to abide the event. What is and what is not an "event" which carries costs.

The declaration in an action of M. v. W. contained two counts: the first, on an agreement by W. to sell a surgeon's business to M., alleging three breaches; the second, for fraud by W. in inducing M. to enter into the agreement. By the pleas, W. denied the first two breaches in the first count, paid money into Court as to the third breach, and pleaded Not guilty to the second count. After issue joined on the pleas, the parties, by agreement, referred all disputes, differences, and accounts between them to an arbitrator; the costs of the reference and award, including such costs of the cause as might be taxed, to abide the event of the award.

The disputes, differences, and accounts

referred, all arose out of the agreement sued on in the first count of the declaration.

The arbitrator awarded in favour of W. in respect of the charges of fraud; in favour of M. on the accounts: awarding that W. should pay M. a certain sum in respect of the latter, and that, except as to the matters decided, neither party had any claim against the other.

Held that, upon this finding, neither party was entitled to any costs: Wightman, Crompton, and Hill, Js., holding that where two parties agree to refer several disputes to arbitration, and use the words "the costs of the reference and award are to abide the event of the award," the costs are not distributable, but there must be a general event of the award altogether in favour of one party, to entitle him to costs; Cockburn, C. J., agreeing in the decision, on the ground that all the matters referred had arisen out of one dispute with respect to one original subject-matter; but declining to decide whether or not, where the matters referred are clearly distinct and separate, the "event" of the award may be construed as "events," so as to make the costs distributable according to the arbitrator's finding. *Re Marsack and Webber*, 637

5. Right to costs of plaintiff in action of tort brought in superior Court against a common carrier for the loss of goods: where plaintiff recovers, by default, less than 20*l*. Stat. 19 & 20 Vict. c. 108, s. 30.

An action against a common carrier for the breach of his duty to carry safely goods delivered to him, as such, to be carried for hire, whereby the goods are lost, is an action not of contract but of tort, in substance as well as in form; the duty being imposed upon him by the custom of the realm, and being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he may also be sued in an action of contract. Held, therefore, that the plaintiff in an action against a common carrier for the breach of the duty in question, brought, in a superior Court, to recover a sum not exceeding 20*l*., is not deprived of his costs, by stat. 19 & 20 Vict. c. 108, s. 30, if the defendant suffers judgment by default; for that the action is not one of contract within that section. *Tattan v. Great Western Railway Company*, 844

II. Taxation of.

1. Principle of, is not matter of error. See I. 1.

2. Taxation on lower scale. What is a failure to recover more than 20*l*. Sum tendered before action, and paid into Court, is not recovered.

To an action on the common indebitatus counts, the writ of summons in which was

endorsed for a debt of more than 20*l.*, consisting of separable items, defendant pleaded, except as to part of the claim, Never indebted, and, as to that part, which also exceeded 20*l.*, a tender of it before action, and payment of it into Court. At the trial of issues joined on these pleas the jury found for defendant as to the tender, and for plaintiff that the sum tendered was too little, by 2*l.* 8*s.* 10*d.*, to satisfy his claim.

Held, that plaintiff had recovered 2*l.* 8*s.* 10*d.* only in the action, and was, therefore, not entitled to have his costs taxed by the Master on the higher scale; having, within the meaning of the directions to the Masters of Hil. Term, 1853, No. 8, failed to recover more than 20*l.* *James v. Lord Harry Vane*, 883

III. Security for.

By Irish officer, plaintiff, serving and domiciled in Ireland.

An Irishman ordinarily resident in Ireland, and having no place of abode in England, is compellable to give security for costs in an action brought by him in England, notwithstanding that he is at the time an officer in the army, serving with his regiment in Ireland. *Chappell v. Watts*, 879

COUNTY BRIDGE.

Discretion of justices whether or not to make order for widening, under stat. 43 G. 3, c. 59, s. 2. Necessity for presentment of insufficiency of bridge, as condition precedent to making the order.

Stat. 43 G. 3, c. 59, s. 2, enacts "that where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the" "justices" of the county, "at any of their General Quarter Sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public." The section further contains a proviso "that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges."

Held, that the section is permissive, not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and incommodious. Held, further, by Hill and Blackburn, Js., that the making of the presentment mentioned in the proviso is a condition precedent to the obligation of the justices to make an order. *Re Newport Bridge*, 377

COUNTY COURT.

I. Accrual of whole cause of action within the district.

Defendant, residing and carrying on business in London, wrote to plaintiffs, residing and carrying on business in S., ordering them to do certain work for him. The letter was received by plaintiffs, and the work was done, in S. A summons having issued, upon plaintiffs' application, against defendant, in the County Court of S., by leave of the Registrar, to recover the amount due for such work: Held, that the whole cause of action arose within the district of that Court, and that the Registrar therefore had jurisdiction to issue the summons, under stat. 9 & 10 Vict. c. 95, s. 60, and stat. 19 & 20 Vict. c. 108, s. 15. *Newcomb v. De Roos*, 271

II. Small Debts Extension (City) Act. Waiver by defendant of objection that Judge's certificate to give plaintiff (suing in superior Court and recovering less than 20*l.*) costs, was not granted forthwith, 671. SMALL DEBTS COURT.

III. Right to costs of plaintiff suing common carrier in superior Court, in tort, for loss of goods; where plaintiff recovers less than 20*l.* by default. Stat. 19 & 20 Vict. c. 108, s. 30; 844. COSTS, I. 5.

IV. Conclusiveness of judgment of County Court that servant's discharge was with just cause, against servant's right afterwards to summon master before justices for wages, 549. MASTER AND SERVANT, III.

V. Duty of County Court Judge to settle and sign case for appeal to superior Court. Stat. 13 & 14 Vict. c. 61, ss. 14, 15. County Court Rules, No. 145.

By stat. 13 & 14 Vict. c. 61, s. 14, either party to a cause in a County Court, who is dissatisfied with its decision, may appeal against the decision to any of the superior Courts, provided he, within ten days of the decision, gives notice of such appeal to the other party, or his attorney, and also gives security for costs; and, if he be the defendant, for the amount of the judgment. Sect. 15 enacts, "that such appeal shall be in the form of a case agreed on by both parties or their attorneys, and if they cannot agree the Judge of the County Court, upon being applied to by them or their attorneys, shall settle the case and sign it." Rule 145 of the County Court practice rules, framed by the County Court Judges appointed by the Lord Chancellor for the purpose, under stat. 19 & 20 Vict. c. 108, s. 32, provides that "all cases of appeal shall, unless the Judge shall otherwise order, be presented to him for signature at the Court holden next after the expiration of twelve clear days from the day

on which judgment was pronounced, and shall then be signed by the Judge, and be sealed with the seal of the Court;" and if the appellant do not comply with this rule the successful party may proceed on the judgment, unless the Judge shall otherwise order.

Held, that a County Court Judge is bound, on the application of an appellant who has complied with the requirements of stat. 13 & 14 Vict. c. 61, s. 14, to settle and sign a case for appeal, though presented to him for that purpose at a Court subsequent to that holden next after twelve clear days from the day on which judgment was pronounced; the effect of rule 145 being not to take away the right of appeal on a failure to comply with the rule, but merely to subject a non-complying appellant to execution, notwithstanding the appeal.

Quære, per Crompton, J., whether, had the rule taken away the right of appeal, it could have overridden the express provisions of the statute? *Hacking v. Lee*, 906

COURT OF CHANCERY.

Opinion of, when not binding on Insolvent Debtors' Court, 586. **BANKRUPT AND INSOLVENT, III.**

DECLARATION.

Of deceased person. **EVIDENCE.**

DISTRESS.

- I. For rent. **LANDLORD AND TENANT.**
- II. For rate. **PUBLIC HEALTH ACT, 1848, I. RATE, I. 3; V.**

DOCUMENT.

Ancient. **EVIDENCE.**

EASEMENT.

Right of way. When does not pass as part of "appurtenances;" and when not as an apparent and continuous easement necessarily incident to the separate enjoyment of severed property.

Certain land, part lying in the parish of N., part in the parish of V., belonged, in 1820, to H. and P., each being seised of an undivided moiety of the whole. A right of way existed from a farm, part of this property, in N., across certain lands on the said property, in V., part of the same farm, to another farm on the said property, in V.; and this right of way had for many years been used by the occupiers of either farm. In 1820, by a deed of partition, H. conveyed his undivided moiety of the part of the property in N. to P., including, among other farms, so much of the farm lying in N. and V. as was in N., "with their and every of their rights, members, easements, and appurtenances." P. also, by the deed, conveyed

his undivided moiety of that part of the property lying in V. to H. The deed contained no express reservation of the right of way to either party. Plaintiff, the present occupier, and the previous occupiers of the farm in N., used the right of way from 1820 to 1859, when it was obstructed by defendant, the then occupier of the farm in V.

In an action by plaintiff for such obstruction: Held, that he could not recover; the right of way not passing under the deed of partition, and not being an apparent and continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed. *Worthington v. Gimson*, 618

EJECTMENT.

COMMON LAW PROCEDURE ACTS, I.

ELECTION.

- I. Of member for the University of London, of the General Medical Council of the United Kingdom, 133. **UNIVERSITY, I.**
- II. Of town councillors in boroughs. Eligibility of mayor, 86. **MUNICIPAL CORPORATIONS REFORM ACT.**

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Of pauper under age, 273. **POOR, I. 2.**

EQUITABLE PLEADINGS.

PLEADING.

ERROR.

- I. Coram nobis, to reverse outlawry on final process, 581. **PRACTICE, II. 1.**
- II. Does not lie on special case stated by arbitrator under The Common Law Procedure Act, 1854, sect. 5, 890. **COMMON LAW PROCEDURE ACTS, II.**

EVIDENCE.

Admissibility of. Documentary. Declaration of deceased persons.

Declaration of deceased inhabitants of a parish as to its extent. What the proper custody of ancient document relating to interest of all the estates in a parish. Requisites to, and effect of, entry of a place as extra-parochial, in Registrar General's report on census of 1851. Stat. 20 Vict. c. 19, s. 1.

Under a rate for the relief of the poor of the parish of T., made on 3d May, 1858, appellant was assessed as occupier of an estate in that parish called N. From the year 1698 down to the time the rate was made, N. had maintained its own poor, and had never been charged with the support of the poor of any other place. On 1st April, 1858, P., the owner of a large estate in the parish of

T., found, among the title-deeds of that estate in his possession, an agreement dated 12th January, 1698, purporting to be made between the then owner of N. of the one part, and six persons therein named and described as of T., as well on behalf of themselves as of all the rest of the inhabitants of T., of the other. This agreement recited that N. was in the parish of T., and provided that, notwithstanding, N. should thenceforth be in no way liable to maintain or keep, or be at any charges or expenses in maintaining and keeping, any poor in the other part of that parish, but only such poor as should come from N.; and that the other part of the parish should be at the cost of maintaining its own poor, but not the poor from N. The agreement further contained covenants between the parties for carrying out this arrangement. It purported to be executed by the owner of N., party to it, and to be agreed to under hand by two inhabitants of T., other than the parties to it of the second part. On an appeal against the assessment, on the ground that N. was not in the parish of T.: held, that this agreement was admissible in evidence, as being an ancient document relating to the interest of all the estates in T., and which might, therefore, naturally and reasonably be expected to be found among the title-deeds of a large estate in T., and, so, came from the proper custody. That it was decisive evidence to show that N. was a part of T. parish, and how N. came to maintain its own poor; and was also evidence of reputation as to the extent of the parish, being a declaration by the deceased owner of N. and the other inhabitants of T. to that effect.

Stat. 20 Vict. c. 19, s. 1, enacts that, "after 31st December, 1857, every place entered separately in the report of the Registrar-General on the last census" (that of 1851) "which now is or is reputed to be extra-parochial, and wherein no rate is levied for the relief of the poor, shall for all the purposes of the assessment to the poor-rate" "be deemed a parish for such purposes, and shall be designated by the name which is assigned to it in such report." In the report, "Thornbury with N." was entered as one place, with one number. In a note appended to this entry, it was stated that N. was deemed extra-parochial, and maintained its own poor. Held, that N. was not entered separately in the report, within the meaning of the statute.

Semble that, had N. been so entered, it must, notwithstanding the other facts in evidence, have been deemed, by virtue of the statute, a parish separate from T., for the purposes of the poor-rate. *Regina v. Mytton*, 557

FI. FA.

BANKRUPT AND INSOLVENT, I. 2. SHERIFF.

FILUM AQUÆ.

- I. Limits of parish coming down to bank of river. Rateability to poor-rate of pier leading from bank into river, 53. RATE, I. 1, i.
- II. Rateability to poor-rate of tolls paid by ships entering a port, in parishes and townships with frontages extending ad medium filum aquæ of the port, 230. RATE, I. 1, ii.

FRAUDS, STATUTE OF.

STATUTE OF FRAUDS.

FRAUDULENT PREFERENCE.

BANKRUPT AND INSOLVENT, I. 1.

GENERAL LIGHTING AND WATCHING ACT.

(3 & 4 W. 4, c. 90.)

RATE, II.

GENERAL MEDICAL COUNCIL.

UNIVERSITY, I.

GREAT WESTERN RAILWAY ACT.

(5 & 6 W. 4, c. cvii.)

Sect. 168. What amounts to the offence of sending dangerous goods by the railway, without notice to the Company. Scienter. Who liable as sender.

Sect. 168 of The Great Western Railway Act, 5 & 6 W. 4, c. cvii., enacts that every person who shall send or cause to be sent by the said railway any vitriol, &c., or other goods of a dangerous quality, shall distinctly mark or state the nature of such goods on the outside of the package, or give notice in writing to the servant of the Company with whom the same are left, at the time of sending, on pain of forfeiting 10*l.* for every default, or being imprisoned. Held, that the Act made the sending of dangerous goods, without notice, a criminal offence: and that therefore a guilty knowledge on the part of the sender was necessary to render him liable under the Act.

Respondents received from N. some cases containing vitriol, and sent them by the railway. The nature of the goods was not marked on the packages or known to respondents when they received the packages. N., in answer to an inquiry by respondents, informed them that the cases contained gun-stocks and other goods of a harmless nature: and respondents so described them in the receiving note sent by them with the goods to the railway, in which note they described themselves as the consignors.

Held that, as respondents had been misled by N. as to the nature of the goods, and had no guilty knowledge of their dangerous character, they were not liable as senders of the goods, within the meaning of the Act:

Although, *semble*, they would have been civilly liable to the Company for any damage arising from the sending.

Semble also, that N. would have been liable, under the Act, as the person causing the goods to be sent. *Hearne v. Garton*, 66

GUARANTEE.

STATUTE OF FRAUDS, I. 1.

HAMLET.

Forming part of a parish. Its rateability to rate made by Burial Board appointed for the parish minus an ecclesiastical district, 9. BURIALS ACT.

HIGHWAY.

I. Appeal against refusal of justices to enforce highway-rate, 325. APPEAL, I. 1.

II. New trial when not granted, after verdict of not guilty on indictment for obstructing highway, 613. PRACTICE, I.

III. What obstruction is an indictable nuisance.

It is an indictable nuisance to obstruct or to employ others to obstruct a public highway or footway, by placing earth and bricks thereon, taking up the pavement and opening trenches for the purpose of laying down service pipes for the supply of gas from public mains to private houses, unless those who do or authorize such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of the houses as an exercise of the right of every householder to make such a temporary obstruction of a highway or footway as may be necessarily incident to the enjoyment of his property. *Regina v. Longton Gas Company*, 651

HUSBAND AND WIFE.

Wife's derivative settlement by estate from husband, 788. POOR, I. 3.

ILLEGALITY.

I. Of voyage in contravention of Customs Consolidation Act, 1853, sects. 170, 171, 172; 1. INSURANCE, I. 1.

II. Contract by putative father with mother of bastard child, to make her an allowance for its maintenance, is not illegal, 730. POOR, III.

IMPOUNDING.

Of a distress for rent. LANDLORD AND TENANT, I. 1.

INFORMER.

Who may be, under a statute giving the penalty to specified persons, 695. TOWN POLICE CLAUSES ACT, 1847.

INSOLVENT.

BANKRUPT AND INSOLVENT.

INSURANCE

I. Marine.

I. Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107. Illegality of voyage, and invalidity of insurance on partly deck-laden cargo, where master of ship fails to comply with sects. 170, 171, 172.

By the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, ss. 170, 171, 172, it is enacted that, before any clearing officer permits a ship wholly or partly laden with timber to clear out from any British port in North America or Honduras, for any port in the United Kingdom, after 1st September or before 1st May in any year, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); and if the master sail without the certificate, or load in the mode forbidden, he shall forfeit 100*l*.

After 1st September, 1856, orders were given for an insurance on cargo and freight by a ship from M., a British port in North America, to a port in the United Kingdom: and the insurance was effected thereupon. Both when the orders were given and when the insurance was effected, it was known to the persons interested in the cargo and freight, and who gave the orders, that much of the cargo was loaded on deck; they intended the ship to sail, so laden, from M. for the United Kingdom, before 1st May, 1857; and they ordered the insurance to be effected with express purpose to cover the whole cargo and freight, including the portion of cargo above deck. On 10th September, 1856, the ship sailed, on the voyage insured, deck laden, and without a certificate to the master from the clearing officer; and the cargo was totally lost.

Held, that the whole voyage was illegal; that the illegality vitiated the insurance with respect to the whole cargo, not merely as to so much of it as was loaded on deck; and that the assured, who were privy to the illegality, could recover nothing from the underwriters. *Cunard v. Hyde*, 1

2. Wrongful taking at sea, by government of assured. Seizure of ship on unfounded suspicion of being engaged in slave trade. Constructive total loss of cargo existing in specie, but deteriorated, at time of action.

Plaintiffs, merchants in London, as agents for F., a Brazilian subject residing at Loanda, chartered the British ship Newport to carry a cargo of goods on behalf of F. from

London to Ambriz or Loanda, on the coast of Africa, and to reload there a homeward cargo of African produce for London. They afterwards, on 9th June, 1854, on F.'s behalf, insured the Newport's outward cargo at and from London to Ambriz or Loanda, by a policy underwritten by defendant. The perils insured against were, inter alia, "takings at sea, arrests, restraints and detentions of all kings, princes, and people, of what nature, condition, or quality soever." In June, 1854, the Newport sailed with this cargo, consigned to F. at Loanda. On 21st September, 1854, while on the voyage out, she was seized, near Ambriz, by a Queen's ship, under stat. 5 G. 4, c. 113, s. 4, for being illegally engaged in the slave trade; and was sent, with the cargo, to St. Helena for adjudication. On 16th October, 1854, ex parte proceedings were instituted in the Vice-Admiralty Court at St. Helena, which Court, on 20th November, 1854, condemned the ship to be forfeited; and, under sect. 7 of the statute, condemned plaintiffs, as shippers of the cargo, in penalties amounting to double the value of the goods, and in costs; and ordered the goods to be held in deposit till payment of the penalties and costs. The ship was sold under order of the Court; as was a portion of the goods, being perishable, in December, 1854. The residue of the goods were detained, in specie, at St. Helena, by the Court. As soon as the proceedings at St. Helena were known in England, notice of abandonment was given to the underwriters on 13th December, 1854, being in due time. At that time the decree of the Court at St. Helena was not known in England. An appeal to the Queen in council against this decree was lodged on 31st January, 1855. Pending the appeal, possession of such of the goods as remained in specie at St. Helena could not be obtained until December, 1856; and then only on the terms of giving security for the invoice cost, without regard to depreciation in value. On 3d February, 1858, the Privy Council gave judgment, reversing the decree of the Court below, and ordering restitution of the ship to her owners; and of the goods still unsold, and the proceeds of the goods sold, to F. On 6th July, 1858, plaintiffs, on F.'s behalf, brought the present action against defendant on the policy, claiming as for a total loss of the cargo. At that time the goods still remaining in specie and unsold at St. Helena had deteriorated in value; but could have been forwarded thence to Loanda at a price less than their value when delivered there.

On a case stated, in which power was reserved to the Court to draw inferences of fact:

Held, first, that the seizure by the Queen's ship of the Newport with the goods insured on board, being wrongful, was a loss of the goods by a peril insured against.

Held, secondly, that the wrongful seizure and the notice of abandonment made the loss total; and that it was still total at the time of action brought; the Court drawing the inference of fact that F., as a prudent man, could not then be reasonably expected to take possession of the unsold goods at St. Helena. *Lozano v. Janson*, 160.

II. Life.

Condition for avoidance of policy, in case of untrue statement, misrepresentation, or concealment, by assured. Imperfect statement by assured of his profession or occupation, not within the condition.

Defendants, an insurance Company, by their form of proposal for insurance against accidents, required the "name, residence, profession, or occupation of the person whose life is proposed to be insured" to be stated. Plaintiff filled up this form thus: "I. T. P. Esquire, Saltley Hall, Warwickshire." Plaintiff lived at Saltley Hall, but he also kept an ironmonger's shop at D. in the same county. Defendants thereupon insured plaintiff's life against accidents, by a policy under which the rate of premium was the same as would have been payable by plaintiff had he described himself as an ironmonger. In the policy was a proviso "that if any statement or allegation contained in the" "proposal be untrue or if this policy has been obtained or shall hereafter be continued through any misrepresentation, concealment, or untrue averment whatsoever," "then this policy shall be void."

Held, dissentiente Cockburn, C. J., that the policy was not rendered void by plaintiff's omission to state that he was an ironmonger.

Judgment affirmed in the Exchequer Chamber. *Perrins v. Marine, &c., Insurance Society*, 317.

IRREMOVABILITY.

POOR, I. 4.

JUDGE.

Of County Court. His duty to settle and sign case for appeal to superior Court, 906. COUNTY COURT, V.

JUDGMENT.

Of County Court. Conclusiveness of. MASTER AND SERVANT, III.

JURISDICTION.

I. Of justices, to enforce church-rate, 386. RATE, V.

II. Of justices, to make affiliation order, notwithstanding putative father has made the mother of the bastard an allowance, 730. POOR, III.

III. Of justices, to enforce payment of special district-rate under Public Health Act, 1848, good on its face and unappealed against, 678. PUBLIC HEALTH ACT, 1848, I.

IV. Of justices, to enforce payment of poor-rate, good on its face and unappealed against, if person summoned is proved to be actual occupier, 836. RARE, I. 3.

V. Of justices, under stat. 35 G. 3, c. 101, s. 2, to suspend execution of order for removal of pauper, 530. POOR, II. 3.

VI. Of justices, after making order under stat. 16 & 17 Vict. c. 97, s. 98, adjudging chargeability of pauper lunatic to county in which he is found, to make subsequent order, under sect. 99, adjudging him chargeable to a parish, 829. POOR, I. 5, ii.

VII. Of Sessions, to adjourn hearing of appeal against order of removal, 185. POOR, II. 2.

LANDLORD AND TENANT.

I. Rent, distress for.

1. What a sufficient impounding of a distress. Right of tenant to tender rent and costs, after impounding, but before sale. Stat. 2 W. & M. sess. 1, c. 5, s. 2.

Stat. 2 W. & M. sess. 1, c. 5, s. 2, enacts "that where any goods or chattels shall be distrained for any rent," "and the tenant or owner of the goods so distrained shall not within five days next after such distress taken, and notice thereof" "replevy the same," the person distraining may, after such distress and notice, and expiration of the five days, sell the goods. Stat. 11 G. 2, c. 19, s. 10, empowers the person making a distress "to impound or otherwise secure the distress" "in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress."

Held that, upon the equity of stat. 2 W. & M. sess. 1, c. 5, s. 2, a tender by the tenant of the rent due, and costs, to the person distraining, within five days after the distress is taken and before sale, though after the distress has been impounded in accordance with stat. 11 G. 2, c. 19, s. 10, is a good tender.

Ellis v. Taylor, 8 M. & W. 415, overruled.

Semble, that a distress is sufficiently impounded, in accordance with stat. 11 G. 2, c. 19, s. 10, where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession on the premises, but does not disturb, lock up, or remove any of the goods. *Johnson v. Upham*, 250.

2. Tender by tenant of rent and costs, to man in possession, is bad.

A man merely left in possession of a dis-

tress by the person who distrained, has no implied authority in law to receive from the tenant payment of the rent distrained for.

W., a broker, in pursuance of a warrant delivered to him by defendant, the landlord, distrained for rent upon goods of plaintiff, the tenant, on the demised premises, and left R. in possession. Plaintiff, knowing that R. was not, and that W. was, authorized in fact by defendant to receive the rent, and that W. was within a reasonable and convenient distance of the premises, tendered the rent to R., who refused to receive it, but offered to send for W., which offer plaintiff rejected. Held, that the tender to R. was not good as against the defendant. *Boulton v. Reynolds*, 369

3. Forcible re-entry by man in possession when justifiable.

The man in possession of goods distrained for rent, having quitted the house for the purpose of refreshment, found, on his return, the door purposely locked against him by the tenant, and broke it open for the purpose of re-entering. Held that, there being no evidence of an abandonment of the distress, the man in possession was justified in so re-entering. *Bannister v. Hyde*, 627

4. Replevin for goods distrained. Right of landlord to distrain for one cause, and make avowry for another.

Declaration in replevin, charging that defendant in close A. and also in close B. took the goods of plaintiff.

Avowries. 1. As to the taking in A., that defendant took the goods there as a distress for arrears of rent due from plaintiff on a demise of A. to him by defendant.

2. The like (*mutatis mutandis*) as to the taking in B.

Plea in bar to both avowries. That defendant did not make a separate and distinct distress upon A., and another upon B., for the separate rents in arrear; but illegally took one joint distress in A. and B. for the several arrears of rent in the avowries respectively mentioned.

Demurrer. Joinder in demurrer.

Held, that the plea in bar was bad; for that a man may profess to distrain for one cause and may avow for another, if a good one; and that as the avowries (admitted by the plea in bar to be true) showed that defendant had a good cause for distraining as he had done, it was immaterial that defendant had, when distraining, assigned an invalid reason for the distress. *Phillips v. Whitted*, 804

II. Tenancy by payment of rent.

Payment of rent, from and after marriage, by husband to wife's previous landlord, is consistent either with a continued tenancy by the wife, or with a determination

of that tenancy, and the creation of a fresh one by the husband, 788. *Poon*, I. 3.

LICENSE.

To use patent. Pleadings relative to, 870. **PLEADINGS**, I. 4.

LIEN.

ATTORNEY, I.

LUNATIC.

Pauper. **Poor**.

MANDAMUS.

To Bishop, to issue commission of inquiry into charges against a clerk in holy orders in his diocese, when refused. Discretion of Bishop, 209. **CHURCH DISCIPLINE ACT**.

MASTER AND SERVANT.

I. Masters and Servants Act, 4 G. 4, c. 34, s. 3.

1. What absenting himself from his service, by an artificer, is punishable; and what is not.

Stat. 4 G. 4, c. 34, s. 3, enacts "That if any" "artificer" "shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and" "having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same," the offender may be committed by a justice to the House of Correction for three months' imprisonment, with hard labour.

Held that, to render an artificer liable under the Act for absenting himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse. *Rider v. Wood*, 338

2. What does and what does not amount to the offence, by an artificer, of not entering into service. Lawfulness of excuse for not entering.

Stat. 4 G. 4, c. 34, s. 3, enacts "that if any" "artificer" "shall contract with any person or persons whomsoever, to serve him, her, or them for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties)," the offender may be committed by a justice to the House of Cor-

rection for a term of not more than three months' imprisonment, with hard labour, and an abatement of wages.

On 5th July, 1858, A., an artificer, made a written contract with P., signed by A. and P., to serve P. for five years from that date, and then entered into the service. On 15th October, 1858, A., so being in P.'s service, made a written contract with H., signed by them both, to serve H. for five years from this latter date. On the next day A. refused to enter into H.'s service, giving as a reason that P. insisted on his remaining in his (P.'s) service.

Held, that A. could not be convicted, under the above Act, for not entering into H.'s service, if he had a lawful excuse for not entering into it; and that the fact that he could not do so without committing the criminal offence of absenting himself from P.'s service was sufficient to constitute such an excuse. *Ashmore v. Horton*, 360

II. Sufficiency of form of conviction by Metropolitan Police Magistrate, for the offence of endeavouring by threats to force a workman to leave his employment, 383. **CONVICTION**.

III. Discharge of servant. Conclusiveness of judgment of County Court, in plaint by servant against master, that the discharge was for just cause. Estoppel thereby upon servant from summoning master before justices, for wages.

A servant in husbandry having been hired to serve from 1st August, 1858, to Martinmas next ensuing, for the wages of 5*l.*, entered the service, and continued in it till 7th September, 1858, when her master discharged her. Thereupon she sued him in the County Court, claiming damages for the discharge, as having been without reasonable cause. The Judge of the County Court gave a verdict for the master, the defendant in the suit. Afterwards, in May, 1859, the servant took out a summons before justices against the master, to recover the 5*l.* wages.

Held that, the question for decision in the County Court and by the justices being substantially the same, namely, whether the discharge of the servant was without just cause, the justices were bound to treat the decision of the County Court, a Court of concurrent jurisdiction, upon it, as conclusive between the parties; although the form of claim in the summons varied from that made in the County Court. *Routledge v. Hislop*, 549

MAYOR.

Of borough. His eligibility as a town councillor, 86. **MUNICIPAL CORPORATIONS REFORM ACT**.

MEMORANDA.

Trinity Term and Vacation, 1859, 180.

Michaelmas Term, 1859, 397.

Michaelmas Vacation, 1859, 419.

Hilary Vacation, 1860, 670.

METROPOLIS LOCAL MANAGEMENT ACT.

(18 & 19 Vict. c. 120.)

18 & 19 Vict. c. 120, ss. 161, 165. Exemption from lighting-rate of land impliedly, though not expressly, exempted from rate by local Act, 1 & 2 G. 4, c. lxxii. (Mile End Old Town.)

By The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 161, a lighting-rate is to be levied in the metropolitan parishes, on the persons and in respect of the property rateable to the poor-rate in the respective parishes. By sect. 165, "in every parish or part of a parish in which, under any" "Act, land is now" "wholly exempted from being rated in respect of" lighting "expenses, such land shall" "be wholly exempted" from the lighting-rate.

At the time that this Act passed, the metropolitan hamlet of Mile End Old Town was lighted under the provisions of a local Act, 1 & 2 Geo. 4, c. lxxii., by sect. 80 of which rates for lighting the hamlet were to be laid upon every person who should "inhabit, hold, use, occupy, be in possession of, or enjoy any messuages, tenements, coach-houses, stables, cellars, vaults, houses, shops, warehouses, or other buildings, tenements, or hereditaments, situate, or being in such of the streets" or other public passages and places within the hamlet, as should from time to time be lighted by virtue of the Act.

Before the passing of stat. 18 & 19 Vict. c. 120, this Court had decided that appellants, a water Company, were not rateable to the lighting-rate, in Mile End Old Town, under stat. 1 & 2 G. 4, c. lxxii., s. 30, in respect of their mains, pipes, and apparatus for conveying water, part of which ran underground through the streets and other public places there.

Held: that, at the time of the passing of stat. 18 & 19 Vict. c. 120, the land occupied by appellants in Mile End Old Town by means of their mains, pipes, &c., was, under stat. 1 & 2 G. 4, c. lxxii., "wholly exempted from being rated in respect of" lighting "expenses" there, within the meaning of stat. 18 & 19 Vict. c. 120, s. 165; and was, consequently, wholly exempted from the lighting-rate levied in Mile End Old Town, under sect. 161 of the latter statute, by respondents, the overseers of the poor. *East London Waterworks Company v. Overseers of Mile End Old Town*,

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METROPOLITAN POLICE.

I. Minor is not emancipated by service in, 275. Poor, I. 2.

II. Sufficiency of conviction by Metropolitan Police Magistrate, for offence of endeavouring by threats to force a workman to depart from his hiring, 383. Conviction.

MISREPRESENTATION.

Defective statement of his occupation by assurer of his own life, not amounting to, 317. Insurance, II.

MONEY HAD AND RECEIVED.

Action for, when unsustainable, 497. Partnership.

MONEY LENT.

Action for, when unsustainable, 497. Partnership.

MUNICIPAL CORPORATIONS REFORM ACT.

(5 & 6 W. 4, c. 76.)

I. Sects. 28, 32-35. Election of town councillors. Disqualification of mayor of borough not divided into wards, who presides, to be a candidate. Mayor of borough divided into wards, when eligible as a town councillor, and for what ward. Vacancy in town council on mayor going out of office.

The mayor of a borough not divided into wards, who, with the two assessors, presides at and declares the result of an election of town councillors for the borough, under stat. 5 & 6 W. 4, c. 76, ss. 32-35, is precluded from being a candidate for election as town councillor; inasmuch as, acting as returning officer, he cannot return himself. Under sect. 28, which enacts that no person shall be eligible as councillor "during such time as he shall hold any office or place of profit, other than that of mayor," in the disposal of the council of the borough, the mayor is eligible as town councillor, if the borough is divided into wards, for a ward in which he is not acting as returning officer.

Where the mayor is one of the councillors who go out of office on the 1st November, he causes a vacancy in the number of councillors, though, as mayor, he continues a member of the council till the 9th November. *Regina v. Owens*, 86

II. Sect. 117. Contribution or non-contribution to county rate the test of the liability of borough having separate Court of Quarter Sessions, to pay expenses of removal to an asylum of pauper lunatic with unascertained settlement, 181. Stat. 18 & 19 Vict. c. 105, s. 14. Poor, II. 1.

NEW TRIAL.

PRACTICE, I.

NUISANCE.

HIGHWAY, III. SMOKE.

NUISANCES REMOVAL ACT (ENGLAND)
1855.

(18 & 19 Vict. c. 121.)

Sect. 40. Sunday counts as one of the two days within which appellant must enter into recognisance to try appeal.

By the Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, s. 40, appeals to the Quarter Sessions against orders made under the Act are not to be heard, unless the appellant, within fourteen days after the making of the order appealed against, gives written notice of appeal and written grounds of appeal, and, within two days of giving such notice, enters into a recognisance before a justice, with sufficient securities, conditioned to try the appeal.

Held, that Sunday is not to be excluded from the computation of the two days within which the appellant is to enter into the recognisance, although Sunday happens to be the last of them; that, therefore, in a case where an appellant had given notice of appeal on a Friday and did not enter into the recognisance till the following Monday, the Sessions were right in refusing to hear the appeal. *Ex parte Simpkin*, 392

OBSTRUCTION OF HIGHWAY.

HIGHWAY, II. III.

ORDER AND DISPOSITION.

BANKRUPT AND INSOLVENT, I. 3, 4.

OUTLAWRY.

Error coram nobis, to reverse. PRACTICE, II. 1.

OVERSEERS.

Their liability to costs of appeal to Sessions, in which their predecessors were respondents, 712. Costs, I. 2.

OWNERSHIP.

Reputed. BANKRUPT AND INSOLVENT, I. 3, 4.

PARISH.

I. Validity of appointment of Burial Board for parish minus an ecclesiastical district, 9. BURIALS ACT.

II. Extent, riverwards, of parish coming down to bank of a river, 53. RATE, I. 1, 1.

III. Effect of separate entry of place deemed extra-parochial, in Registrar-General's report on census of 1851; as making such place a separate parish for poor-rate purposes, 557. EVIDENCE.

PARTNERSHIP.

Partnership for particular purpose, between English firm and firm abroad. Non-liability of English firm to purchasers from the foreign firm of bills drawn by the latter on the English firm, and refused acceptance by that

firm. Bankruptcy of the firm abroad, and proof thereunder by the purchasers of the bills. Subsequent action by such purchasers against the English firm unsustainable. Money lent; money had and received. Statement by broker of foreign firm not binding on English firm.

Von S. & Co., merchants trading in Buenos Ayres under that title, agreed with defendants, merchants trading in London under the title of R., B. & Co., to carry on joint exchange operations; by which Von S. & Co. were, at Buenos Ayres, to draw bills periodically on defendants, at ninety days' sight, to sell them there, and to invest the proceeds, keeping defendants out of cash advance by periodically remitting to them bills to the same amount on other firms, to be bought by Von S. & Co. These transactions were to be on the footing of a community of profit and loss.

Plaintiffs, another firm of merchants at Buenos Ayres, bought there of Von S. & Co. certain of the bills drawn by the latter, in their own name, on defendants, in the course of these operations. Plaintiffs were induced to buy the bills by the statement of a broker, employed by Von S. & Co. to procure purchasers, that "the bills were all in order, he having seen" defendants' "letter of credit to Von S. & Co., in virtue of which the bills were drawn." Defendants refused to accept these bills on presentation. Von S. & Co. became bankrupts, and plaintiffs proved on the bills against their estate, and recovered forty per cent. of the amount. Plaintiffs also brought this action against defendants. The declaration contained counts on the bills against defendants as drawers; counts for money lent and money had and received, and a count for the breach of a contract by defendants to accept the bills.

On a case stated embodying the above facts, and giving the Court power to draw inferences of fact: held, that plaintiffs had no cause of action against defendants. That defendants were not drawers of the bills, the signature "Von S. & Co." to the bills not including defendants, though the agreement between Von S. & Co. and defendants created a partnership between them. That defendants were not liable for money lent, plaintiffs having made no loan to Von S. & Co.; or for money had and received, plaintiffs not having paid money on a consideration which had wholly failed. That defendants had not contracted with plaintiffs to accept the bills; Von S. & Co. having no authority to make such a contract for defendants, and (per Crompton and Hill, Js.) not having in fact made any such contract, the broker's statement to plaintiffs amounting merely to an expression of belief that the bills would be, not to a contract that they should be, accepted. *Nicholson v. Ricketts*, 497

PAUPER.

POOR.

PAWNBROKER.

Pawnbrokers' Act, 40 G. 3, c. 99, ss. 14, 24, 35.

Proper form of order of justices against pawnbroker, where goods pledged with him have been lost through his negligence. His right to appeal to Quarter Sessions. Power of Queen's Bench, under stat. 20 & 21 Vict. c. 43, s. 6, to amend order of justices, on appeal.

Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before justices, under stat. 40 G. 3, c. 99, s. 14, against the pawnbroker for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner. Held, on a case stated, that the order was bad: sect. 14, under which the order was made in effect, applying only to cases of wilful refusal by a pawnbroker to deliver up goods actually in his possession: and that the justices should have made an order under sect. 24, which empowers them to award compensation to the owner if, "in the course of any proceedings" under the Act, they shall find that the goods were lost "through the default, neglect, or wilful misbehaviour" of the pawnbroker.

Semble, that the Court had power to amend the order to one in accordance with sect. 24, under stat. 20 & 21 Vict. c. 43, s. 6.

But, as in such case the appellant would have lost his right of appealing to the Quarter Sessions, under stat. 40 G. 3, c. 99, s. 35, the Court remitted the case to the justices *Shackell v. West*, 326

PLEADING.

I. Pleadings on equitable grounds.

1. Bad plea on equitable grounds, to action on Parliamentary subscription contract, against subscriber to projected railway Company, after scheme is abandoned, 398. COMPANY, I.
2. Plea on equitable grounds to action by payee against maker of promissory note: that defendant made it as surety for a co-maker, to plaintiff's knowledge, and that plaintiff gave time to the co-maker, is good, 424. BILLS OF EXCHANGE, I.
3. Inadmissibility of equitable pleading in common law action, where defendant simultaneously sets up in equity the facts pleaded.

A party to an action in a Court of common law will not be allowed to plead therein,

on equitable grounds, facts which he has, pending the action, set up in a Court of equity as entitling him to relief, in proceedings instituted there with reference to the subject-matter of the action. *Schlumberger v. Lister*, 855

4. Action by assignee of patent for its infringement. Plea of license by original patentee to defendant, to use it. Replication on equitable grounds that, by deed contemporaneous with license but embracing additional parties, the license was qualified; bad.

Declaration by assignee of a patent for improvements in machinery, for its infringement by defendant, by making, selling, and counterfeiting the patented machines.

Plea. That the patentee died intestate while the patent was vested in him; that his administrator granted by deed to S. & A., and to such persons as they should from time to time license, empower, or authorize in that behalf, exclusive liberty and license to make, use, and vend the invention throughout England and Wales, Berwick-upon-Tweed, Scotland, and Ireland; that S. & A. granted and assigned to defendant the said exclusive liberty and license; and that the alleged infringement was an exercise of that liberty and license.

Replication, on equitable grounds. That, by a certain other deed of the same date as the deed of license to S. & A., and made between the administrator of the patentee of the one part, plaintiff and five other persons (naming them) of the second part, and S. & A. of the third part, reciting that, by arrangement with the deceased patentee, the parties thereto of the second part were entitled to participate in the profits to be derived from the patent; and that S. & A. had contracted with the parties of the first and second parts for the absolute purchase of a license for the exclusive use of the invention, and it had been agreed that the said contract should be carried out as thereafter appeared, and that the covenants thereafter contained should be entered into; and reciting that, in part performance of the said contract, the deed of license to S. & A. (being the deed in the plea mentioned) had been executed: it was witnessed, in pursuance of the said contract, that each of the parties thereto thereby covenanted and agreed with the others of them that S. & A. should not manufacture machines, under or by virtue of the said license, for sale out of Great Britain and Ireland. Of all which defendant, before the granting and assignment of the said license by S. & A. to him, had notice. That afterwards, by deed dated 30th October, 1852, between S. & A. of the first and defendant of the second part, reciting the facts above stated, and that S. & A. had contracted with defendant to assign, and

had, by a deed also dated 30th October, 1852, assigned to him the said license: it was witnessed that defendant covenanted with S. & A., inter alia, to observe and perform the covenant by them in the previous deed, not to manufacture machines, under or by virtue of the license, for sale out of Great Britain and Ireland: and to indemnify S. & A. from the consequences of the non-observance thereof. Averment of breaches by defendant of the covenant in question, by manufacturing the patented machines in England for sale out of England, and by the sale out of England of the patented machines and parts thereof.

Demurrer. Joinder in demurrer.

Held, that the replication was bad. That the license to S. & A. and the contemporaneous deed were not to be read as one deed, and that therefore the absolute terms of the former were not qualified by the covenants in the latter. That, although in equity defendant was bound by those covenants, a Court of common law could not do complete equity between all parties in the matter, having no jurisdiction to bring before it the five covenantees, parties, in addition to plaintiff, to the said contemporaneous deed, or to restrain possible future actions by them against defendant. *Schlumberger v. Lister*, 870

II. Bad pleas in action by trustees of projected, but abortive, Company against a subscriber, on the Parliamentary subscription contract, 398. COMPANY, I.

III. Admissions in pleading, by defendant in error coram nobis, brought to reverse outlawry on final process, 581. PRACTICE, II. 1.

POOR.

I. Settlement.

1. By apprenticeship.

Attorney's articted clerk gains it as such.

An attorney's clerk, articted by indenture, is an apprentice within the meaning of stat. 3 & 4 W. & M. c. 11, s. 8; and, as such, gains a settlement under that statute in the parish in which he inhabits while serving under his articles. *St. Pancras v. Clapham*, 742

2. Of minor. Minor emancipated by marriage, but not by service in Metropolitan Police Force.

In May, 1845, a minor, whose father was then settled in S., left his father's house for London, with his father's consent, and entered the Metropolitan Police. He continued to live in London and to serve in the Police from that time till May, 1846; when, being still under age, he married. During the whole time between his coming to London and his marriage, he might have returned to his father's house to reside, but never did so. At Lady Day, 1846, his father gained a set-

tlement in H. Held, that the son was not emancipated until his marriage; that, consequently, he derived from his father the settlement in H.; so that the son's wife and children were not removable to S. *Regina v. Inhabitants of Selborne*, 273

3. By estate.

Wife's derivative settlement from husband.

Tenancy by husband to wife's landlord before her marriage.

An order of removal of the pauper, a married woman, from the respondent to the appellant township, was appealed against on the ground that she, by derivative settlement from her husband, was settled in a third township by estate acquired by him there, through her. Thereupon a case was stated, under stat. 12 & 13 Vict. c. 45, s. 11, for the opinion of this Court on the following facts.

The appellant township was the settlement of the pauper's husband before marriage. Before and at the time of the marriage, the pauper rented a cottage in H., the third township, at 1s. a week. From and after the marriage, her husband resided with her in the cottage for seven years; during which he paid the said weekly rent, and since which he had gained no other settlement.

Upon these facts, held: That the pauper's settlement, through her husband, was in H.: for that he, by the marriage and residence in the cottage for forty days thereafter, acquired a settlement by estate in H. in right of his wife, her tenancy from week to week having vested in him by the marriage; and, though then determinable, not having been determined within the forty days. That a determination of the wife's tenancy and the commencement of a new one by the husband, could not be presumed from the fact, consistent with either tenancy, that he, after the marriage, paid the rent; and that the actual, though at the time of the marriage uncertain, continuance of the wife's estate for forty days after the marriage, was sufficient for the purposes of the settlement. *Regina v. Inhabitants of Thornton*, 788

4. By residence.

Relief to father, after five years' residence.

Retention by him and his unemancipated children, living with him, of the status of irremovability. Stat. 9 & 10 Vict. c. 66, s. 1. Retention of such status by child, after death of parents.

In 1855, the pauper's father and mother went to reside at E., and they both continued to reside there till July, 1847. The pauper was born there in January, 1844. In July, 1847, the mother became chargeable to E., as a lunatic, and was removed to an asylum at B. In September, 1849, an order was made by justices, adjudging the mother's settlement to be in S. After remaining in the

asylum, at the charge of S., for several years, she was removed to the workhouse in S., and was maintained there by S., as a lunatic, till her death in October, 1858. The pauper continued to reside with her father, in E., from her birth till his death, in December, 1857; and, after his death, she remained there till February, 1858, when she became chargeable to E. In December, 1858, an order was made for her removal to S., which was quashed, on appeal, by an order of Sessions. Held, confirming the order of Sessions, that the pauper was, by stat. 9 & 10 Vict. c. 66, irremovable from E.; for that the relief afforded to her father by the maintenance of her mother did not deprive him of the status of irremovability from E. which he had previously acquired; that that status was communicated to the pauper, and that she retained it at the date of the order of removal.

Regina v. Inhabitants of Elret, 266

5. Of pauper lunatic.

- i. Order of justices adjudging, under stat. 16 & 17 Vict. c. 97, s. 97, on whom to be made. Amendment of such order by Quarter Sessions, under sect. 113.

By stat. 16 & 17 Vict. c. 97, s. 97, an order of justices, adjudicating the settlement of a pauper lunatic, is to direct payment of the expenses of his maintenance, &c., to be made by the guardians of the parish of settlement, if it be a parish under a board of guardians; if not, by the overseers. Sect. 108 gives an appeal to the Quarter Sessions against such an order; and sect. 113 empowers the Sessions, at the hearing of the appeal, to amend any omission or mistake in the drawing up of the order, if satisfied that enough was in proof before the justices making it to have authorized them to have drawn it up correctly.

L. was a parish in which, under a Local Act, the rector, churchwardens, and overseers, together with twenty-one other persons elected in pursuance of the Act, were constituted the select vestry of, and the board of guardians for, L.

An order of justices made under stat. 16 & 17 Vict. c. 97, s. 97, adjudging the settlement of a pauper lunatic to be in L., directed payment of the expenses of his maintenance, &c., to be made by the churchwardens and overseers of L.; and was served on the overseers. On an appeal by the overseers to the Quarter Sessions against this order, the Sessions amended the order by substituting in it the word "guardians" for the words "churchwardens and overseers."

Held, that the order of justices was bad, being directed to and served upon a body distinct from the guardians of L., and not upon the guardians of L. under a misnomer.

Held further, that the Sessions had not power, under sect. 113, to amend the order as

stated; the amendment making the order a new one, and upon new parties who were not before the Sessions. *Regina v. Inhabitants of Liverpool,* 687

- ii. Order of justices under stat. 16 & 17 Vict. c. 97, s. 98, adjudging the lunatic chargeable to the county in which he is found, is not final. Subsequent order on application of such county, under sect. 99.

An order of justices, under stat. 16 & 17 Vict. c. 97, s. 98, obtained at the instance of the parish by which a pauper lunatic has been sent to an asylum, and adjudging him to be chargeable to the county in which he is found, on the ground that he is not settled in that parish, and that his parish of settlement cannot be ascertained, is an interim and not a final order. The county is, therefore, not estopped by submission to it from afterwards obtaining orders of justices under sect. 99, adjudging the pauper to be settled in the parish which obtained the first order, and requiring that parish to pay for his future maintenance. *Churchwardens, &c., of All Saints, Poplar, v. Clerk of Peace for Middlesex,* 829

6. By being charged with and paying parochial rates.

- i. Intention on part of parish officers to charge the pauper with the rates paid, must be shown. Stats. 35 G. 3, c. 101; 3 & 4 W. & M. c. 11, s. 6.

Notwithstanding stat. 35 G. 3, c. 101, it is necessary, in order to establish that a settlement has been gained by a pauper, under stat. 3 & 4 W. & M. c. 11, s. 6, by being charged with and paying parochial rates, to show an intention to charge him with the rates, on the part of the officers of the parish in which the settlement is alleged to have been gained.

P. was married in 1825. In 1833 his wife left him, and went to live at M. In November, 1841, she became entitled, in possession, to a freehold house in M., which she occupied thenceforth until P. became chargeable as after-mentioned. She was, by her married name, from time to time rated to and paid the poor-rate in M., in respect of this house, on an assessment of upwards of 10*l.* yearly value; being described in the rate-book as both owner and occupier. In June, 1842, P. came to M., and resumed cohabitation with his wife, but left her again in the following October, and never afterwards returned. A poor-rate made in M. before June, 1842, was paid by P.'s wife while he was living with her there. After his departure in October, 1842, the wife continued to be rated and to pay the rates, as before, in M. The parish officers of M. never dealt with or recognised P. as a rate-payer. In January, 1859, P., who till then had been

supported by his wife, became chargeable as a pauper lunatic in W.

On a case stated setting out these facts, and giving the Court power to draw inferences of fact: held, that P. had not acquired a settlement in M. under stat. 3 & 4 W. & M. c. 11, s. 6. *Regina v. Inhabitants of St. Anne, Westminster*, 485

ii. What payment sufficient. Payment of any one distinct parochial rate. Stat. 3 & 4 W. & M. c. 11, s. 6.

Stat. 3 & 4 W. & M. c. 11, s. 6, enacts, "that if any person who shall come to inhabit in any town or parish" "shall be charged with and pay his share towards the public taxes or levies of the said town or parish," he shall gain a settlement there, though he has given no such written notice of his having come to inhabit there as the Act elsewhere requires.

A. rented and occupied a house in E., a township wholly within the borough of L., from September, 1857, to November, 1858. Only one poor-rate in each year was made by the overseers of E. In 1857, it was made in March for the ensuing year; and the then occupier of the house was assessed to it, and paid the whole amount assessed. In 1858, it was made in April for the year then ensuing, and A. was assessed to it in 17. 4s., of which sum (the whole of which was, in the first instance, demanded of him) he ultimately paid only 14s., the calculated proportion for the period of his occupation subsequent to the making of the rate. The house remained unoccupied from the time A. quitted it until after the making of the next poor-rate. In April, 1858, the town council of L., under The Municipal Corporations Acts, 5 & 6 W. 4, c. 76, s. 92, and 7 W. 4 & 1 Vict. c. 81, s. 1, made a watch-rate for L. for the year ending 1st March, 1859, and ordered the overseers of E. to levy and collect the proportion thereof payable by the parts of E. liable thereto, by a pound-rate upon the owners of all rateable property within those parts, and to exempt from the rate such parts of E. as were more than two hundred yards distant from any street or continuous line of houses which were regularly watched within the borough under the provisions of The Municipal Corporations Acts. The overseers of E. levied and collected the rate in pursuance of the order. A. was one of the occupiers whom they assessed to it, and he paid the whole amount assessed.

Held, first, that A. did not gain a settlement in E., under stat. 3 & 4 W. & M. c. 11, s. 6, by his payment of the poor-rate, not having paid the whole of the amount of it with which he was charged. Secondly, that nevertheless he did gain that settlement by his payment of the watch-rate; for that the statute is satisfied by the payment, by an inhabitant of a parish, of his share towards

any one distinct public tax or levy of the parish with which he is charged, as such inhabitant, by the parish officers, and that (Crompton, J., dubitante as to this) the watch-rate was such a public tax or levy of E., though parts of E. might be exempt from it. *Everton v. South Stoneham*, 771

II. Removal.

1. Borough, having separate Court of Quarter Sessions, when and when not liable to pay expenses of removal from it to an asylum of pauper lunatic of unascertained settlement. Stats. 5 & 6 W. 4, c. 76, s. 117; 18 & 19 Vict. c. 105, s. 14.

Under stat. 18 & 19 Vict. c. 105, s. 14, if lunatics whose settlement cannot be ascertained are sent to an asylum from a borough having a separate Court of Quarter Sessions, the borough is liable to the expenses if it does not contribute to the county rate under stat. 5 & 6 W. 4, c. 76, s. 117, and is not liable if it does so contribute.

By the Court of Exchequer Chamber, affirming the judgment of the Court of Queen's Bench. *Regina v. Bacchus*, 181

2. Entry and respite of appeal against order of removal, where neither notice of trial nor grounds of appeal are served before the next practicable Sessions. Adjournment of hearing, by Sessions.

An order of removal was served on 13th September, 1858, and notice of appeal served on 2d October, 1858. By the rules of practice at the Sessions, ten clear days' notice of trial was required to be given by appellants. No notice of trial, nor grounds of appeal, were served before the next Quarter Sessions, which were held on 18th October, 1858. At these Sessions appellants entered and respited their appeal. On 18th December, 1858, appellants served a notice of trial of the appeal at the Quarter Sessions held on 4th January, 1859, accompanied with a statement of the grounds of appeal. The appeal was heard at the January Sessions, and the order of removal was quashed.

Held, that the Sessions had jurisdiction to adjourn the hearing of the appeal from the October to the January Sessions: but that, as the appellants had had time to bring on the trial of the appeal at the October Sessions, the better course would have been to refuse an adjournment. *Regina v. Inhabitants of Skircoat*, 185

3. Jurisdiction of justices, under stat. 35 G. 3, c. 101, s. 2, to suspend execution of order of removal, on ground of pauper's inability to travel; when to be exercised.

By stat. 35 G. 3, c. 101, s. 2, "in case any poor person shall" "be brought before any" "justices" "for the purpose of being removed from" his place of sojourn "by virtue of any order of removal," "and it shall appear to the said" "justices that such poor person is

unable to travel, by reason of sickness or other infirmity," "the" "justices making such order of removal" are required and authorized to suspend the execution of the same, until satisfied that it can be executed without danger to the person to be removed; and the suspension is to be endorsed on the order of removal.

Held, dissentiente Wightman, J., that under this statute the suspension of the execution of an order of removal of a pauper can only be made by the justices at the same time as the order of removal itself; the justices being, after that time, *functi officio*. *Regina v. Inhabitants of Llanllechid*, 530

III. Jurisdiction of magistrate to entertain application by mother of bastard for affiliation order on putative father, who has contracted to make her an allowance for its support. Stat. 7 & 8 Vict. c. 101, ss. 3, 5. Such contract not illegal. Duty of magistrate to take it into consideration.

Stat. 7 & 8 Vict. c. 101, s. 3, enacts that, upon the hearing by justices of a summons taken out by the mother of a bastard child against the putative father, the justices "may" "if they see fit, having regard to all the circumstances of the case," make an order for the payment by the putative father to the mother of a weekly sum not exceeding 2s. 6d. Sect. 5 alludes to this order as an "order for the maintenance or support of" the "bastard child," and provides for the payment of the weekly sum to a person to be appointed by the justices, instead of to the mother, in case of her death, lunacy, imprisonment, or sentence to transportation.

At the hearing by a Metropolitan Police Magistrate of an application by respondent, the mother, against appellant, the putative father, of a bastard child, for an order under sect. 3, it appeared that, prior to the application, appellant had contracted with respondent to pay her 5s. per week for the support of the child, had performed this contract for some time, and had then paid respondent in advance for another two years, of which a year and a half were still unexpired. At the time of making the payment in advance, he had also paid her the further sum of 10l., in consideration of which she had then agreed to release him from all further payments in respect of the child.

The magistrate, being of opinion that the contract was void in law, and ought not to be taken into consideration, made an order for the payment of 2s. 6d. weekly to respondent by appellant.

On appeal, held, first, that the contract was not void in law; but that neither it nor the release were a bar to the magistrate's jurisdiction to make the order, such order being, under the statute, for the benefit of the child, and not of respondent exclusively. Secondly, that the magistrate, in exercising

his discretion whether or not to make the order, ought to have taken the contract into consideration as one of the circumstances of the case; which was accordingly remitted to him for the purpose of his doing so. *Fol-lit v. Koetsow*, 730

PORT.

Liability to poor-rate of anchorage and beaconage tolls paid by ships entering, 230.
RATE, I. 1, ii.

PRACTICE.

I. New trial.

After verdict of not guilty on indictment for obstructing a highway; when not granted.

After a verdict of Not guilty upon an indictment for obstructing a highway, a new trial will not be granted on the ground that the verdict was against evidence; although the Judge who tried the case reports that he is dissatisfied with the verdict. *Regina v. Johnson*, 613

II. Error.

1. Error coram nobis to reverse outlawry on final process. Appearance by plaintiff in error in person. Admissions by defendant, in pleading.

It is sufficient for the plaintiff, in a writ of error coram nobis to reverse outlawry upon final process, to appear in person by the writ to assign error; it is not necessary that he should appear in person at the subsequent stages of the proceedings.

The defendant in error having pleaded a joinder in error to such a writ, by which the plaintiff in error purported to appear in person; held, that defendant had thereby precluded himself from afterwards applying to set aside the proceedings, on the ground that the plaintiff in error had not in fact appeared in person by the writ.

The plaintiff in error coram nobis assigned, as error, that he was beyond seas when the exigent was issued, and the defendant in error pleaded in nullo est erratum to the writ. Held that, the ground assigned as error not being disputed, the plaintiff in error was entitled, as of right, to judgment of reversal of the outlawry: and, he having appeared in person by the writ, the Court, on the prayer of counsel on his behalf, pronounced judgment, reversing the outlawry, and refused to suspend it until he should have satisfied the original judgment-debt. *Smith v. Bromley*, 581.

2. Error does not lie on special case stated by arbitrator under sect. 5 of The Common Law Procedure Act, 1854; 890. COMMON LAW PROCEDURE ACTS, II.

III. Security for costs. COSTS, III.

PRESENTMENT.

Of insufficiency of county bridge, 377. COUNTY BRIDGES.

PRINCIPAL AND AGENT.

I. Validity of notice to agent of attorney of execution-creditor, employed to put in *fi. fa.* on goods of execution-debtor, of act of bankruptcy committee by execution-debtor, 116. **BANKRUPT AND INSOLVENT, I. 2.**

II. Non-liability as principals, on charter-party partly written and partly printed, which mentions "charterers" throughout the printed portions, of agents for a named individual charterer, made parties to and signing the charter-party as such.

A charter-party, made in London, between plaintiff, shipowner, and defendants, "as agents to Samuel Ferguson, of Anamaboe, merchants and charterers," was signed "for D." (plaintiff) "owner, H. G. as agent. For Samuel Ferguson, Esq., of Anamaboe. G. brothers," (defendants), "as agents." The charter-party was partly written and partly printed, the words "merchants" and "charterers" being printed, and in the plural, throughout it. Defendants, merchants in London, acted in England as agents for Ferguson, a native of Africa, and residing at Anamaboe in that country. By the charter-party, plaintiff's ship was chartered for a voyage from London to Africa and back, and freight was made payable on delivery of the return cargo.

Held, that defendants were not personally liable, as principals, on the charter-party.

Judgment affirmed in the Exchequer Chamber. *Dealandes v. Gregory*, 602

PRINCIPAL AND SURETY.

I. Pressure by surety for repayment of money borrowed, on principal about to become bankrupt, prevents the return of the money by principal to the creditor from being a fraudulent preference, 29. **BANKRUPT AND INSOLVENT, I. 1.**

II. Discharge of surety.

1. In equity.

Equitable plea to action by payee against maker of promissory note, that defendant made the note, to plaintiff's knowledge, as surety only for a co-maker, and that plaintiff, without defendant's consent, gave time to the co-maker; is good. Grounds of the surety's discharge in equity, 424. **BILLS OF EXCHANGE, I.**

2. At law.

Surety for poor-rate collector when not discharged by transfer of principal to collectorship of fresh district.

By an order of the Poor Law Commissioners plaintiffs, guardians of a Union, were directed to appoint collectors of the poor-rates of such of the several parishes in the Union as plaintiffs might deem to require a collector; and every person appointed a collector was required to give security for the due performance of the duties of his office.

In the interval between this order and the passing of stat. 13 & 14 Vict. c. 99, which regulates the collection of poor-rates assessed upon the owners of small tenements in parishes, plaintiffs, in pursuance of the order, appointed several persons as collectors of the poor-rates of P., one of the parishes in the Union. Subsequently to that Act, and to its adoption by the parish of P., plaintiffs determined to appoint an additional collector; and, one of those originally appointed having resigned, advertised that they were about to appoint "two persons to be collectors of the poor-rates of the parish of P., to one of whom" would "be assigned a collection of such rates from the owners of small tenements." W., in answer to the advertisement, sent in the following written application: "There being two collectors of poor-rates about to be appointed for the parish of P., may I" "offer myself as a candidate for one of them?" Plaintiffs afterwards elected W. and another person, by a resolution which declared that the latter was elected in the place of the retiring collector, and W. for the purpose of collecting the rates from the owners of small tenements. Both appointments were approved of by the Poor Law Board. Defendant then executed a bond as surety for W., which, after reciting the order of the Poor Law Commissioners, and that W. had been "duly appointed to be a collector under the said order," was conditioned for the faithful discharge by W. of his duties "during his continuance in the said office of collector." W. entered on his duties, and for some years collected the poor-rates assessed upon the owners of small tenements in P. One of the previously appointed collectors, who collected all the poor-rates in L., a district of P., then resigned, and plaintiffs, on W.'s application, transferred him to that district. No new bond was then executed. W. afterwards committed defalcations, in respect of which plaintiffs now sued defendant, as surety, upon the bond executed by him.

Held, that defendant was liable; for that W. was appointed, in the first instance, as collector of the poor-rates of P. generally, not of the poor-rates payable by the owners of small tenements in P. exclusively; so that his transfer to the L. district was not an appointment of him to a fresh office, or such an alteration in his duties as to discharge his surety from further liability. *Guardians of Portsea Island Union v. Whillier*, 755

PUBLIC HEALTH ACT, 1848.

(11 & 12 Vict. c. 63.)

I. Sects. 86, 135. Obligation of justices to issue distress-warrant to enforce special district-rate good on its face and unappealed against. Appeal against rate lies only to Sessions.

At the hearing, by justices, of a summons taken out by appellants against respondent, for non-payment of a special district-rate to which he had been assessed by appellants, a Local Board of Health, under The Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 86, it appeared that the rate was good on the face of it, and had not been appealed against; and that respondent had failed, after due demand, to pay it. Respondent, however, contended that the rate was bad, on the ground that it was made in order to pay off money borrowed by appellants for the execution of works not of a permanent nature; whereas, under sect. 86 of the Act, special district-rates may be made, and, under sect. 107, money may be borrowed, in respect of such works only. It further appeared that the General Board of Health had consented to the borrowing of the money by appellants on the credit of the special district-rates, for the execution of the works in question; and had declared themselves satisfied that the works were of a permanent nature.

The justices declined to issue a distress-warrant to enforce the rate; and stated a case, under stat. 20 & 21 Vict. c. 43, for the opinion of this Court whether, under the circumstances, they ought to have done so.

Held, that the justices were bound to have issued the warrant, the rate being good on its face and unappealed against, and respondent's objection, if well founded, being ground for an appeal against it, under sect. 135 of the Public Health Act, to The Quarter Sessions, which alone had jurisdiction to decide on the validity of the rate. *Luton Local Board of Health v. Davis*, 678

- II. Sect. 135. Exclusive jurisdiction of Quarter Sessions to hear appeal against rates made under the Act, 420, 678. APPEAL, I. 2. And see I.

QUARTER SESSIONS.

I. Appeal to. APPEAL, II.

II. Amendment by, of order of justices adjudicating settlement of pauper lunatic, 687. POOR, I. 5, i.

III. Adjournment by, of hearing of appeal against order of removal, 185. POOR, II. 2.

RAILWAY COMPANY.

COMPANY, II.

RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

(8 & 9 Vict. c. 20.)

Sect. 114. Penalty under, not incurred by careless use on railway of engine constructed so as to consume its own smoke.

The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), sect. 114, enacts that "every locomotive steam-engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be con-

structed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the Company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway."

Held, that a penalty is not incurred under this section, unless the engine using smoke-emitting fuel is so defectively constructed as to be incapable of consuming its own smoke, though used with proper care; that, consequently, no penalty attaches where the engine, though properly constructed on the principle of consuming its own smoke, is so carelessly used on a railway as to emit instead of consume its smoke. *Manchester, Sheffield, &c., Railway Company v. Wood*, 344

RATE.

I. Poor-rate.

1. Principles of rateability.

- i. Rateability of pier leading from bank of a river into the river in a parish coming down as far as the bank of the river.

Where a parish comes down as far as the bank of a river, there is a *prima facie* presumption that the parish extends as far as the middle of the river. A pier leading from the river's bank, in such a parish, into the river, beyond the low-water mark, and consisting of a fixed platform, supported on piles commencing within two or three inches from the bank, and a floating barge moored close to, but not attached to, the platform, is to be held, in the absence of evidence to rebut the presumption, as being within the parish. And such pier is rateable to the poor-rate. *McCannon v. Sinclair*, 53

- ii. Rateability of anchorage and beaconage tolls paid by ships entering a port, in the parish and townships on the port. Principle on which such tolls should be rated.

The port of S. extends from the bar at the mouth of the river W. and low-water mark of the sea, about eight miles up the river. It includes so much of the river as is within those limits. A parish and several townships are situated on the shores of the port, their respective river frontages extending *usque ad medium flum aquæ*. The Bishops of D. (the then owners of the whole soil and freehold of the port below low-water mark on each side of the river,) their lessees or officers, set up beacons, placed, fixed and maintained mooring-buoys, posts and rings, and did other works within the port for the use and benefit of ships resorting thither, down to the passing of stat. 3 G. 1, c. iii., by which Commissioners were appointed for the river W., who have since had the entire control of the port, its beacons and moorings. The soil of the port between high and low water mark is, in some parts, owned by adjacent land owners. From time imme-

morial, tolls called "anchorage and beaconage," have been paid in the port to the Bishops of D. and their lessees; being 1s. 2d. paid for every ship entering the port. Every such ship necessarily passes and floats over part of the soil of the port, and may have to cast anchor therein, or to be moored to the moorings affixed and sunk in the river, or on the quays or shores adjacent. Ships paying this toll come into the said parish and the said townships on the port. Another and distinct toll is charged, by the private owners of the quays on both sides of the river, to all ships using mooring posts set up on such quays by such owners. By lease dated 26th November, 1853, the Bishop of D. demised to appellant for twenty-one years, from 3d September, 1853, the port of S., together with, amongst other tolls collected therein, the anchorage and beaconage tolls. Appellant has ever since received these tolls. Stats. 6 & 7 W. 4, c. 19, and 21 & 22 Vict. c. 45, which transferred to the Crown many of the rights of the Bishop of D., left untouched the right of the Bishop and his lessees to these tolls. On 1st October, 1855, the estate of the Bishop of D. in the soil and freehold of the port of S. became vested in the Ecclesiastical Estates Commissioners. Appellant had never resided in the parish or any of the townships in question.

Held, on a case stated, which empowered the Court to draw inferences of fact: first, that the anchorage and beaconage tolls were not tolls in gross, but tolls connected with the occupation and use of the soil of the port; and were therefore rateable to the poor-rate in the parish and the townships on the port, into which the ships paying them came. Secondly, that such tolls were to be rated on a calculation of the number of ships paying the toll and coming into those parts of the port which were in the parish and the townships respectively, and ought not to be rated according to the respective river frontages or populations of the parish and the townships. *Earl of Durham v. Overseers of Bishopwearmouth*, 230

iii. Rateability of occupier of tithe rent-charge. What allowance not to be made to him.

The Archbishop of Canterbury, being the owner of the impropriate rectory and tithe rent-charge of the parish of H., and of land thereto appertaining, granted, under The Augmentation Acts, 29 Car. 2, c. 8, and 1 & 2 W. 4, c. 45, to the perpetual curate of T. (a separate and distinct parish from H.) an annual rent of 40l., to be charged upon and yearly issuing out of the said rectory, tithe rent-charge, and land. Subsequently to this grant, the Archbishop leased the said rectory, tithe rent-charge, and land to G., a clergyman, for twenty-one years, G. to yield

and pay yearly, during the term, to the Archbishop, 9l. 13s. 4d., and also 6l. 16s. for redeemed land-tax; and also to the perpetual curate of T. the said sum of 40l., in augmentation of the revenues of the curacy.

Held that, in assessing G. to the poor-rate of H. as occupier of the tithe rent-charge of H., no allowance was to be made to him in respect of his yearly payment of the 40l.; for that the whole of the rent-charge was included in the demise to him, and the 40l. was part of the rent paid by him for the occupation of the whole, not so much of the whole withdrawn from his occupation. *Regina v. Groves*, 793

iv. Separate rateability of place deemed extra-parochial; if separately entered in Registrar-General's report on census of 1851, 557. EVIDENCE.

2. Making and publication of.

Validity of rate made on part of a parish for defraying expenses of Burial Board appointed for that part, 9. BURIALS ACT.

3. Recovery of.

Duty of justices to enforce, by distress-warrant, rate good on face and unappealed against. Appeal against rate on ground that appellant, though actual, is not beneficial occupier lies to Sessions only.

If, at the hearing by justices of a summons against A. for non-payment of a poor-rate, it appears that the rate is good on its face and unappealed against, and that A. is actually the occupier of the rated property in the rating parish, the justices are bound to issue a distress-warrant to enforce the rate; and have no jurisdiction to inquire whether A.'s occupation is or is not beneficial, the nature of the occupation being ground only for appeal to the Quarter Sessions against the rate. *Regina v. Bradshaw*, 836

II. Lighting and watching rate under General Lighting and Watching Act. Victoria London Docks, how rateable. "Property other than land."

By The General Lighting and Watching Act, 3 & 4 W. 4, c. 90, s. 33, "owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any" "parish," are to be rated at "a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated." By sect. 34, "every court-yard, yard, or garden (such garden not being a market garden or nursery ground) shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively attached."

The Victoria London Docks cover an area of 165 acres, 95 of which form a wet dock, tidal basin and canal, all covered with water; the remaining area consists of jetties

which intersect the wet dock and basin, and of warehouses and buildings on the jetties. The whole forms one enclosure, occupied by appellants; who make different charges for the use of the wet dock and basin, and for the use of the warehouses and buildings. The whole area is lighted and watched at appellants' sole expense.

In a watching and lighting rate, imposed under the above Act, appellants were rated, in respect of the whole area, at a rate in the pound thrice greater than that at which the occupiers of land were rated.

On an appeal, in respect of the ninety-five acres, from a decision of Sessions confirming the rate: Held, by Lord Campbell, C. J., Wightman and Crompton, Js., that appellants were rateable at the higher rate in respect of the ninety-five acres; for that such acres were "property other than land," and ejusdem generis with houses and buildings.

Held, by Erle, J., that appellants were rateable at the lower rate; for that the ninety-five acres were "land." *Peto v. Overseers of West Ham*, 144

III. Lighting-rate under Metropolis Local Management Act. Exemption, by sect. 165, of land from rate, 447. METROPOLIS LOCAL MANAGEMENT ACT.

IV. County-rate. Non-liability of borough contributing to it, to pay expenses of removal to asylum of lunatic pauper of unascertained settlement, 181. POOR, II. 1.

V. Church-rate.

Notice of objection to validity of. Jurisdiction of justices to enforce it by distress-warrant, how ousted by. Stat. 53 G. 3, c. 127, s. 7.

Stat. 53 G. 3, c. 127, s. 7, after empowering churchwardens to summons before justices persons refusing to pay a church-rate, provides that "if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon."

Held that, in order to oust the jurisdiction of justices under this section, notice that the validity of the rate is disputed must be given to them in a manner such as to induce them to forbear giving judgment.

At the hearing of a summons before the justices, the attorney who attended for the person summonsed took no objection to the jurisdiction of the justices, but, after cross-examining the witnesses called by the churchwardens, submitted objections to the validity of the rate to the decision of the justices. The justices having overruled the objections, he then, but not before, gave them notice that he bona fide disputed the validity of the rate. The justices, however, made an order upon the person summonsed to pay the rate.

Upon these facts this Court, in the exercise of its discretion, discharged with costs a rule for a certiorari to bring up and quash this order. *Regina v. Justices of Salop*, 386

VI. Special district-rate, under Public Health Act, 1848. Validity of how questioned. Justices when bound to enforce it, 678. PUBLIC HEALTH ACT, 1848, I.

VII. Sewers-rate under Local Act incorporating Public Health Act, 1848. What appeal proper from order of justices enforcing, 420. APPEAL, I. 2.

VIII. Burial-rate. Validity of rate by Burial Board for parish minus an ecclesiastical district. Rateability of hamlet, 9. BURIALS ACT.

IX. Maidstone Improvement Rate. Exemption from, of Maidstone County Gaol. Stat. 54 G. 3, c. civ. s. 18.

By local and personal public Acts of Parliament, Improvement Commissioners were appointed to act in and for the town of M. in the county of K., and were authorized to levy annually within the town, for the purposes of the Acts, a certain rate upon, amongst other public buildings, all gaols situated within the town. A subsequent local and personal public Act, 54 G. 3, c. civ., sect. 18, after reciting that it was expedient that the county of K. "should be relieved and exonerated from any taxes in respect of any of the gaols" "of the said county," enacted that "no rate, tax, or assessment whatsoever, parliamentary or parochial," should "be raised, assessed, or levied on, or be payable by, the said county" "for or on account of the said gaols" "or any or either of them."

Held, that this section exempted a county gaol, situated in M., from assessment to the annual rate leviable by the M. Improvement Commissioners. *Regina v. Justices of Kent*, 911

RECOGNISANCE.

By appellant, under stat. 18 & 19 Vict. c. 121, s. 40, 392. NUISANCES REMOVAL ACT.

REGISTRATION.

I. Of bill of sale. BANKRUPT AND INSOLVENT, I. 4.

II. Of shareholders in Railway Company. Right of bona fide purchaser from fraudulent holder of shares, to be on the register 812. COMPANY, II.

REGISTRAR-GENERAL.

Report of, on the census of 1851, 557. EVIDENCE.

REMOVAL.

Order of. POOR, II.

RENT.

Distress for. LANDLORD AND TENANT, I.

REPLEVIN.

LANDLORD AND TENANT, I. 4.

REPUTED OWNERSHIP.

BANKRUPT AND INSOLVENT, I. 3, 4.

RETAINER.

Of attorney. ATTORNEY, III.

RULES.

County Court. COUNTY COURT, V.

SALE.

VENDOR AND VENDEE.

SECURITY FOR COSTS.

COSTS, III.

SERVANT.

MASTER AND SERVANT.

SETTLEMENT.

Of pauper. POOR, I.

SHAREHOLDER.

COMPANY.

SHERIFF.

Attorney issuing *fi. fa.* when not liable to sheriff who executes it by mistake against the goods of a wrong person, whom he consequently has to compensate. Effect of endorsement by the attorney, on the writ, of name, description, and residence of judgment-debtor.

Defendant, as attorney for P., who had obtained judgment against W. F., took out a writ of *fi. fa.* against W. F., which was endorsed in the usual form, the endorsement being followed by these words: "the defendant is a" [blank] "and resides at Redcar, in your bailiwick." The plaintiff in the present action was sheriff of Yorkshire, and he issued a warrant, setting out the endorsement of the writ verbatim. His officer went with the warrant to Redcar, where W. F., the son of the W. F. named in the writ, lived. The son informed the officer that he was not the person against whom the writ was issued, but that his father, who lived at Coatham, an adjacent village, probably was; and the father subsequently came and admitted the fact. The officer, however, seized the goods of W. F., the son, at Redcar, who afterwards recovered damages against the plaintiff, as sheriff, for the wrongful seizure. Plaintiff brought this action to recover from defendant the amount of the said damages and costs. The first count of the declaration alleged that defendant, by the endorsement, and with the intent that plaintiff should act upon the statement, falsely represented to plaintiff that the W. F. named in the writ resided at Redcar, whereby plaintiff was induced to seize. The second count alleged that defendant negligently and improperly,

but with the view and intent that plaintiff should act upon the statement, endorsed the writ with a direction and statement to plaintiff that the W. F. named in the writ resided at Redcar; whereby plaintiff, acting on such statement, seized. The third count alleged that defendant, by the endorsement, required and directed plaintiff to seize the goods of W. F., residing at Redcar; and that plaintiff, acting on such direction, seized.

Plea, that defendant had good reason to believe, and did believe, that the W. F. named in the writ resided at Redcar; and that defendant so endorsed and delivered the writ with no other intent or view than to furnish such information as he believed to be true for assisting plaintiff, as sheriff, in duly ascertaining whether there were within his bailiwick goods and chattels of the said W. F. named in the writ; and that, save by such endorsement and delivery, defendant did not state or represent, or make or give any direction or statement to plaintiff, or direct or require plaintiff to do, as in the declaration alleged.

On demurrer, held (dissentiente Wightman, J.) that the action was not maintainable, the representation alleged in the first count not having been fraudulently made: the second count not alleging or showing any duty in defendant, as between himself and the sheriff, to make the statement in question: and the endorsement not amounting to a direction to the sheriff, as alleged in the third count, but being merely a statement by defendant for the purpose of affording information to the sheriff, leaving him a discretion as to acting upon it. *Childers v. Wooler*, 287

SLAVE TRADE.

Seizure of ship on unfounded suspicion of being engaged in, 160. INSURANCE, I. 2.

SMALL DEBTS COURT.

Small Debts Extension (City) Act. Recovery by plaintiff of less than 20*l.*, in superior Court. Waiver by defendant of delay by Judge in granting certificate for costs.

A plaintiff in, amongst other actions, detinue, who sues in a superior Court, when he might have sued in the London Sheriffs' Court, and recovers by verdict less than 20*l.*, is, by The London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), sect. 121, to be entitled to his costs if the Judge before whom the verdict is obtained "shall forthwith certify on the back of the record that it appeared to him at the trial that" "there was a sufficient reason for bringing the" "action in the" superior Court.

At the trial, on 3d February, of such an action, plaintiff had a verdict for 10*l.*, and thereupon applied to the presiding Judge for a certificate for costs. The Judge took time to consider the application, defendants rais-

ing no objection to that course. On 15th February, the Judge granted the certificate.

Held, that defendants were precluded from objecting that the certificate was not granted forthwith, within the meaning of the statute. *Heden v. Atlantic Steam Navigation Company*, 671

SMOKE.

I. Penalty when incurred, and when not, by use on a railway of an engine which does not in fact consume its own smoke, 344. RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

II. Steam-tug when liable to penalty imposed by stat. 19 & 20 Vict. c. 107, s. 1, for not consuming its own smoke.

Stat. 19 & 20 Vict. c. 107, s. 1, enacts that "all steam-vessels plying to and fro between London Bridge and any place on the River Thames to the westward of the Nore Light," shall be subject to the same penalties for not consuming their own smoke as are imposed by stat. 16 & 17 Vict. c. 128, upon all steam-vessels above London Bridge.

Held, that a steam-tug not carrying passengers, but employed exclusively in towing ships for hire to and from the docks in the river, occasionally from and to places to the eastward, but generally from and to places to the westward of the Nore Light, was, while employed on any portion of the river between the limits named by the Act, liable to penalties for not consuming its own smoke.

Walker v. Evans,

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STATUTE.

Construction of.

I. Words disregarded in favour of intention.

Liability of succeeding corporation to attorney originally retained by their predecessors, and continued to be employed by them. Stat. 17 & 18 Vict. c. cccix.

"The Guardians of the Poor within the city of Oxford," a body consisting of certain ex officio guardians and of guardians to be elected by the different parishes in Oxford, were incorporated by stat. 11 G. 3, c. 14, s. 1. In November, 1853, they agreed with the University of Oxford and some of the Colleges and Halls, that an Act of Parliament should be applied for, to subject certain College and University property to rates, and to admit representatives for the University and Colleges to the Board of Guardians. On 24th November, 1853, plaintiffs, a firm of attorneys at Oxford, were retained by the then Guardians, under their corporate seal, as their solicitors "in the matter of the College rating, and soliciting the bill for that purpose through Parliament." Plaintiffs accepted the retainer, and, together with the solicitors for the University and Colleges, applied for and obtained, in 1854, stat. 17 & 18 Vict. c. cccix. Sect. 1 of this Act repeals

stat. 11 G. 3, c. 14, and sect. 2 provides for the election of a new corporate Board of Guardians for Oxford, by the City, University, Colleges, and Halls; such board to consist of, inter alia, "eleven guardians for the" "parishes," "one to be elected for each parish." By arrangement between the then Guardians and the University, before the Act passed, sect. 31 was inserted in it; which section, after reciting that the University, Colleges, and Halls maintained that certain land and buildings of theirs were exempted by law from liability to poor-rate, and that the Vice-Chancellor of the University of the one part, and "the Guardians of the Poor of the several parishes" of the other, had agreed that a case should be stated, to be prepared by their respective solicitors, for the opinion of the Court of Queen's Bench on the question of such exemption, enacts that the Court shall hear such case, when stated, and that its decision thereupon "shall be final and binding upon the parties aforesaid, and the costs attending the same shall be borne by the respective parties, and those incurred by the University, Colleges, and Halls shall be paid by them, and those incurred by the said Guardians shall, when duly taxed, be paid out of the funds under their control." The Guardians of the Poor of the several parishes in Oxford, as such, had not, before or since the passing of this Act, any funds under their control. Defendants were duly elected the new Board of Guardians under the Act, and have since acted and levied rates, as such. Defendants paid plaintiffs' costs of procuring and passing the Act. A special case was, in pursuance of sect. 31, settled, approved, and signed by the University solicitor and plaintiffs, in communication with defendants. At a meeting of defendants, on 20th November, 1856, a resolution was passed, recognizing plaintiffs as defendants' solicitors in reference to the special case. On 12th June, 1857, the Queen's Bench gave judgment on the case: and defendants had since levied rates on such of the University and College property as the Court held to be rateable. In the following November, defendants' clerk wrote to the plaintiffs for their bill of costs in the matter of the special case, and defendants delivered it in December. At a meeting of defendants on 3d February, 1859, a resolution was passed for payment of this bill.

On a case stated, in an action by plaintiffs to recover the amount of this bill from defendants; held that defendants, and not "the Guardians of the Poor of the several parishes" in Oxford, were liable to plaintiffs' claim; and that the action was maintainable, although defendants had not affixed their seal to the resolution of 20th November, 1856. *Mallam v. Guardians of the Poor of Oxford*, 192

II. Stat. 17 G. 3, c. 56, s. 10. Penalty for concealment of purloined or embezzled materials. Meaning of "place."

Sect. 10 of stat. 17 G. 3, c. 56, enacts that it shall be lawful for any two justices, upon complaint made to them upon oath that there is cause to suspect that purloined or embezzled materials, used in certain manufactures, are concealed "in any dwelling-house, out-house, yard, garden, or other place or places," to issue a search-warrant for the search, in the day time, of every such dwelling-house, &c.: and if any such materials, suspected to be purloined or embezzled, are found therein, to cause the same, and the person "in whose house, out-house, yard, garden, or other place" they are found, to be brought before two justices: and if the said person shall not give an account to their satisfaction of how he came by the same, he shall be adjudged guilty of a misdemeanour.

Held, that a warehouse, occupied for business purposes only, and not within the curtilage of or connected with any dwelling-house, was a "place" within the meaning of the section. *Regina v. Edmundson*, 77

III. Stat. 12 & 13 Vict. c. 92, s. 3. What amounts to the offence of aiding and assisting at cock-fighting.

By stat. 12 & 13 Vict. c. 92, s. 3, "every person who shall keep or use or act in the management of any place for the purpose of fighting" "any" "cock," "or shall permit or suffer any place to be so used," is subjected to a penalty "for every day he shall so keep or use or act in the management of any such place, or permit or suffer any place to be used as aforesaid;" "and every person who shall in any manner encourage, aid, or assist at the fighting" "of any" "cock" "as aforesaid," is made liable to a penalty not exceeding 5*l*.

Held, that a person does not incur this latter penalty by aiding and assisting at cock-fighting in any place; but only if the place be one so kept or used for the purpose, as to subject the keeper of it to the penalty imposed by the first clause of the section. *C'ark v. Hugue*, 281

STATUTE OF FRAUDS.

(29 CAR. 2, c. 3.)

I. Sect. 4.

1. Necessity for written guarantee to contain the names of all the parties to the contract.

Defendant wrote, signed, and handed to T. & O. the following document: "Sir, I beg to inform you that I shall see you paid to the sum of 800*l*. for the ensuing building which you undertake to build for Messrs. T. & O. THOMAS LAKK." He intended it to be handed over by T. & O. as a guarantee

to J., who was then negotiating with T. & O. to erect for them the building referred to. T. & O., however, having agreed with plaintiff, instead of J., that plaintiff should erect the building, delivered the document to plaintiff, without defendant's knowledge or authority. Defendant afterwards heard of and ratified this delivery. Plaintiff, having erected the building, sued defendant on the document, as a guarantee.

Held, that the document was not a sufficient written agreement, or note or memorandum thereof, by defendant, to answer for the debt or default of T. & O., within the 4th section of the Statute of Frauds; inasmuch as the name of the person for whom the document was intended did not in any way appear upon the face of it, so that it did not contain the names of both the parties to the contract. *Williams v. Lake*, 349

2. Contract for board and lodging is not one concerning an interest in land.

By a parol agreement between plaintiff, a boarding-house keeper, and defendant, defendant agreed to pay plaintiff, for the board and lodging of himself and man, and accommodation for his horse, at the boarding-house, 200*l*. a year from a fixed day; the agreement to be terminable by a quarter's notice on either side.

Plaintiff having sued defendant for a breach by him of this agreement, in refusing to become an inmate of the boarding-house: Held that, though the agreement was unwritten, the action was maintainable; for that the contract was not one for any interest in or concerning land, within sect. 4 of the Statute of Frauds, 29 Car. 2, c. 3. *Wright v. Stavert*, 721

II. Sect. 17.

What is an acceptance and actual receipt of goods by vendee. Acceptance and dealing with the bill of lading for goods shipped.

Defendant, on 27th September, 1855, verbally ordered of plaintiffs, at Liverpool, goods of the value of more than 10*l*., to be sent out to Constantinople, by a steamer named by defendant, for The Phoenix, a ship of defendant, then in the Black Sea. Plaintiffs selected the goods in accordance with the order, and sent them to the steamer, together with two barrels of flour belonging to defendant, which he had sent to plaintiffs' warehouse for the purpose of being forwarded with the other goods. Defendant told plaintiffs to make out, and plaintiffs made out, the bill of lading for the goods in their own name, making the goods deliverable to Messrs. H. & Co., or assigns, at Constantinople, to whom plaintiffs had before consigned goods, and to whom defendant, on that account, wished the goods to be made deliverable. The bill of lading included the two barrels of flour. On 18th

October, 1855, plaintiffs shipped the goods, including the flour, on the named steamer, and paid freight for the whole. On 16th October, defendant repaid them the freight and received from them the bill of lading, which he forwarded to the captain of The Phoenix, who did not receive it till March, 1856, when, finding that the goods were not forthcoming at Constantinople, he returned it to defendant. On 5th November, 1856, defendant forwarded the bill of lading to plaintiffs, enclosed in the following letter. "I enclose the bill of lading for stores sent out to the bark Phoenix. Please see after them. I think the master of the steamer must account for them."

Held that, upon these facts, there was ample evidence that defendant had accepted and actually received the goods, within the meaning of sect. 17 of the Statute of Frauds, 29 Car. 2, c. 3. *Currie v. Anderson*, 592

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TOWN COUNCIL.

MUNICIPAL CORPORATIONS REFORM ACT.

TOWN POLICE CLAUSES ACT, 1847.
(10 & 11 Vict. c. 89.)Sect. 35. Liability of licensed ale house keeper
to conviction as keeper of refreshment house,
for suffering prostitutes to assemble and con-
tinue on his premises. Effect of Local Act
(King's Lynn Improvement), incorporating
this section, and giving penalty to specified
persons. Who may be informer.

The King's Lynn Improvement Act, 22 Vict. c. xxxii., s. 113, incorporates the clauses of The Town Police Clauses Act, 1847, 10 & 11 Vict. c. 89, relating to places of public resort. By sect. 35 of the latter Act, "every person keeping any house" "or other place of public resort" "for the sale or consumption of refreshments of any kind, who knowingly suffers common prostitutes" "to assemble at and continue on his premises" is made liable to a penalty. By stat. 22 Vict. c. xxxii., s. 120, justices who inflict any penalty under the Act are to award it to be paid either to the Corporation, or to the Paving Commissioners, of King's Lynn, according as the proceeding for the penalty is taken on behalf of the one or other of those bodies.

Appellant, a licensed alehouse keeper at King's Lynn, was convicted by justices, on an information laid by respondent, the clerk to the Paving Commissioners, in a penalty under stat. 10 & 11 Vict. c. 89, s. 35. Respondent had no authority from the Commissioners, express or implied, to lay the information, further than that he had, by their

direction, published a handbill, signed by him as their clerk, stating that the section in question would be strictly enforced.

Held, that the conviction was good; for that, first, the information was well laid; per Cockburn, C. J., because, the offence charged being one against the public, respondent, assuming that he had no sufficient authority from the Commissioners to inform, might inform in his individual capacity, provided (as it was to be taken that he had done) he claimed the penalty on behalf of the Commissioners; per Crompton, J., because the facts showed that respondent had professed to inform on behalf of the Commissioners, and, if so, he could not be required to show that he had in fact (as *semble* he had) their authority to inform. That, secondly, licensed alehouses are not excepted from the operation of stat. 10 & 11 Vict. c. 89, s. 35, although the keepers of them are subject to the provisions of prior Acts of Parliament. Judgment on both points concurred in by Blackburn, J. *Cole v. Coulton*, 695

TRANSFER.

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TURNPIKE.

Exemption of Queen's carriage and horses
from turnpike tolls.

A carriage and horses belonging to the Queen, driven by the Queen's coachman, and used by a member of the Queen's household, or his family, with the Queen's permission, though not upon the Queen's service, are exempt from turnpike tolls. *Westover v. Perkins*, 57

UNIVERSITY.

I. Member, for University of London, of
General Medical Council of United Kingdom,
by whom elected.

Stat. 21 & 22 Vict. c. 90, s. 3, enacts that a Council, to be styled "The General Council of Medical Education and Registration of the United Kingdom," "shall be established." By sect. 4 this Council is to "consist of one person chosen from time to time by each of" several "bodies," including the University of London.

Held that, under the existing charter of that University, the right to elect its member of the General Medical Council is vested in its Senate, consisting of the Chancellor, Vice-Chancellor, and Fellows for the time being; not in the whole body incorporated as the University by the charter, namely, the Chancellor, Vice-Chancellor, Fellows, and Graduates. *Regina v Storrar*, 133

II. Board of Guardians of the Poor for Uni-
versity and City of Oxford. Their liability
to attorney retained, under seal, by their
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STATUTE, I.

VAGRANT ACT.

(5 G. 4, c. 83.)

Meaning of "found offending" in sect. 6. Constable when not bound to apprehend, without a warrant, a person charged with offending against the Act.

By stat. 5 G. 4, c. 83, s. 3, it is made a punishable offence in any person, who has the means of maintaining his family, to wilfully refuse or neglect so to do, whereby any of his family, whom he is legally bound to maintain, become chargeable to any parish. By sect. 6 any one may apprehend and take before a magistrate, or may deliver to any constable, to be taken before a magistrate, "any person who shall be found offending" against the Act; and any constable refusing or neglecting wilfully to apprehend such an offender is made liable to conviction. By sect. 7 magistrates are empowered to grant warrants for the apprehension of offenders against the Act.

Held, that a constable is not liable to conviction under sect. 6 for refusing to apprehend, without a warrant, at the request of the relieving officer of a parish, a man charged by the officer with having wilfully neglected to support his wife, and caused her to become chargeable to the parish; the person so charged not being, even if guilty, "found offending" within the meaning of that section. *Horley v. Rogers*, 674

VENDOR AND VENDEE.

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WATERWORKS CLAUSES ACT, 1847.

(10 & 11 VICT. c. 17.)

Sect. 12. Compensation when payable, and when not, to persons sustaining damage through exercise of powers of the Act. General principles for determining whether compensation is payable or not, under statutory compensation clauses.

A person who sustains injury from the execution of works authorized by a statute, is not, generally speaking, entitled to compensation, under the compensation clauses of the statute, unless the injury sustained is such as, had the works not been authorized by the statute, would have given the claimant a right of action.

Appellants, in the execution of works authorized by a local Act, which incorporated The Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, intercepted water from percolating underground into a well belonging to respondent; and also abstracted from the well water which had already so percolated into and was in it. The said Act, 10 & 11 Vict. c. 17, enacts, by sect. 12, "that in the exercise of" the powers conferred by the Act "the undertakers shall do as little damage as can be," "and shall make full compensation to all parties interested for all damage sustained by them, through the exercise of such powers."

Held that, inasmuch as, apart from the statute, no action would have lain by respondent against appellants in respect of either the interception or the abstraction of such water, the statute gave respondent no right to compensation in respect of either. *New River Company v. Johnson*, 433

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